

CONTEMPT OF CONGRESS V. EXECUTIVE PRIVILEGE

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INTRODUCTION

It is no secret that the George W. Bush Administration made a major effort to expand (or restore, depending upon one's perspective) the President's power with respect to the other branches of government.¹ In particular, the Bush Administration attempted to strengthen the President's power to withhold documents from Congress and the courts under the doctrine of executive privilege,² which had taken quite a beating during the Clinton Administration.³ Near the end of President Bush's first term, he won a major victory when the Supreme Court ruled that he did not even have to assert executive privilege in order to protect from disclosure documents relating to the National Energy Policy Development Group, chaired by Vice President Cheney (and commonly known as the "Energy Task Force").⁴ The President managed to avoid a major confrontation with Congress over executive privilege until after the 2006 election, when the Democrats regained control of the House of Representatives and began to conduct more vigorous oversight of the executive branch.

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¹ See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY* (2007); Cynthia Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 U. PA. J. CONST. L. 357, 359–61 (2010) (arguing that the ascendancy of the "personal" presidency has forced Congress and federal agencies into roles that support the president's agenda); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559, 1564–66 (2007) (considering the need for legal constraints on executive action, in light of the Bush Administration's policies on detention of terrorism suspects and Congress's accession to them).

² See Mark J. Rozell, *Executive Privilege Revived?: Secrecy and Conflict During the Bush Presidency*, 52 DUKE L.J. 403, 405 (2002) ("President Bush has exercised the privilege in an attempt to reestablish what he perceives as a more correct balance of powers between the legislative and executive branches.").

³ See generally Jonathan Turley, *Paradise Lost: The Clinton Administration and the Erosion of Executive Privilege*, 60 MD. L. REV. 205 (2001) (evaluating what remains of executive privilege "in the aftermath of Clinton's failed assertions").

⁴ See *Cheney v. U.S. District Court*, 542 U.S. 367, 390–91 (2004) (noting that district courts can "explore other avenues, short of forcing the Executive to invoke privilege, when they are asked to enforce against the Executive Branch unnecessarily broad subpoenas").

This change of power coincided with one of the major scandals of the Bush Administration, the Attorney General's decision to fire nine United States Attorneys for what many believed to be politically motivated reasons.⁵ The House Judiciary Committee began hearings into the dismissals and sought witnesses and documents from both the Department of Justice ("DOJ") and the White House.⁶ Although the White House offered to produce some of the requested documents and provide testimony under a number of restrictions, the committee was not satisfied with the response because of the restrictions on the testimony and the fact that the White House refused to provide any documents relating to communications within the White House.⁷ The committee then issued subpoenas to (among others) former White House Counsel Harriet Miers for testimony and White House Chief of Staff Joshua Bolten for the internal White House documents.⁸ In response to the subpoenas, the President, based upon advice from the DOJ, asserted a claim of executive privilege and refused to produce additional documents or allow Miers to testify.⁹ After further negotiations proved fruitless, the House voted to cite Miers and Bolten for contempt of Congress.¹⁰ The Attorney General, acting pursuant to long-standing DOJ practice, refused to proceed with any further action on the contempt of Congress citations.¹¹

Then the Judiciary Committee did something that Congress had done only once before (and not since the Watergate era); it filed a lawsuit in federal court seeking judicial enforcement of the subpoenas.¹² The DOJ argued that the subpoenas were subject to a claim of absolute privilege, and it moved to dismiss the suit on the ground that it was non-justiciable.¹³ District Judge John Bates rejected the executive's argument that the suit was non-justiciable and partially granted the committee's motion for summary judgment.¹⁴ The judge did not order disclosure of all the documents, nor did he order Miers to answer every question; instead he ordered the White House to

5 See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 57–58 (D.D.C. 2008) (noting potential political motives behind the U.S. Attorney firings).

6 *Id.* at 58.

7 *Id.* at 60.

8 *Id.* at 61.

9 *Id.* at 61–62.

10 *Id.* at 63.

11 *Id.* at 63–64.

12 *Id.* at 64. The only previous case in which Congress had filed for civil enforcement of subpoenas to the executive branch was *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725 (D.C. Cir. 1974).

13 *Miers*, 558 F. Supp. 2d at 65, 100.

14 *Id.* at 108.

produce a detailed description of the documents being withheld, and he ordered Miers to give sworn testimony during which her counsel could interpose objections to individual questions on the ground of executive privilege.¹⁵ The court then suggested that, now that the President's claim of absolute privilege had been denied, the parties return to the usual process of negotiation and accommodation and work out a compromise.¹⁶ The parties reached such a compromise agreement, but only after the change of administrations.¹⁷

As frequently happens after incidents in which the President overreaches in making claims of unilateral executive authority, there was a substantial scholarly backlash. Two commentators have argued that Congress should make more vigorous use of its inherent contempt power and arrest officials who assert the President's claim of executive privilege.¹⁸ A third scholar has argued that Congress should have the absolute right to determine what documents the executive branch must produce and that courts should give conclusive effect to Congress's own resolution of the President's claims of executive privilege.¹⁹ Finally, two others have argued that courts should intervene to resolve executive privilege disputes even more aggressively than Judge Bates did and not defer to the traditional negotiation-accommodation process between Congress and the executive branch.²⁰

This Article contends that all of these arguments are overreactions to the excessive claims of privilege during the Bush Administration and that the traditional negotiation-accommodation process between

¹⁵ *Id.* at 106, 108.

¹⁶ *Id.* at 106.

¹⁷ See Carrie Johnson, *Deal Clears Rove, Miers to Discuss Prosecutor Firings*, WASH. POST, Mar. 5, 2009, at A08 (reporting that former President Bush acted "at the urging of the Obama administration, and in consideration of the executive branch interests at stake" (internal quotation marks omitted)).

¹⁸ See Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1152 (2009) (suggesting that each House's Sergeant-at-Arms could arrest contemnors and hold them in custody); Michael A. Zuckerman, Note, *The Court of Congressional Contempt*, 25 J.L. & POL. 41, 44 (2009) (same).

¹⁹ See Heidi Kitrosser, *Secrecy and Separated Powers: Executive Privilege Revisited*, 92 IOWA L. REV. 489, 493–96 (2007) ("This Article concludes that there is no such thing as a constitutionally based executive privilege, and courts—in the face of executive privilege claims—should order compliance with any statutorily authorized demands for executive branch information.").

²⁰ See Gia B. Lee, *The President's Secrets*, 76 GEO. WASH. L. REV. 197, 203 (2008) (advocating that a court conduct "a searching review of the extent of [the executive's confidentiality] . . . interest in each case"); David A. O'Neil, *The Political Safeguards of Executive Privilege*, 60 VAND. L. REV. 1079, 1083 (2007) ("Courts must play some substantive role in a coherent system for resolving interbranch battles over information.").

Congress and the executive branch remains the best way to resolve inter-branch disputes over access to information, as long as the courts remain ready to reject claims of absolute constitutional prerogative from both sides and to push the parties back to the bargaining table. First, the contention that there are historical precedents for the use of Congress's inherent contempt power against officials who assert the President's claim of executive privilege²¹ is incorrect. Not only is there no precedent for such use of Congress's contempt power, in over 200 years of innumerable contentious disputes over congressional access to executive branch information, Congress has never asserted that it has such authority. Moreover, claims that Congress needs such power to enforce its investigative demands²² are belied by the consistent success (indeed, some might say too much success) Congress has had in forcing disclosures from the executive branch since the Watergate era during the Nixon Administration. Second, arguments in favor of Congress's absolute authority to determine the validity of an executive privilege claim are no more consistent with Supreme Court precedent and our constitutional history than the President's arguments in favor of absolute privilege. Giving Congress such absolute power would only aggravate the current tendency for Congress to use its investigative power for partisan purposes. Finally, courts should not play a more active role in resolving information disputes between Congress and the President, partly because of the difficulty a court has in assessing the needs of the branches given the virtually infinite variety of information disputes, but more importantly because a court would have no way of determining which among the vast array of possible conditions should be imposed on the disclosure of documents to Congress. Courts should leave that to the political branches, which have proved to be wonderfully adept at fashioning a wide variety of terms and conditions to resolve information disputes.

This Article begins in Part I with a discussion of the competing constitutional powers of the political branches: Congress's investigative power and its authority to enforce subpoenas and the President's right to preserve the confidentiality of certain types of executive

21 See Chafetz, *supra* note 18, at 1084 (suggesting that legislative contempt power has had "a key role in resolving contested questions of the allocation of power within the federal government").

22 See *id.* at 1145 (arguing that Congress must have access to information from the executive branch in order to uncover "executive branch malevolence and incompetence"); Zuckerman, *supra* note 18, at 63 (emphasizing that "Congress should in certain cases resort to its direct power to punish for contempt," since otherwise "the Executive's refusal to prosecute may result in unremedied obstruction to the legislative process").

branch information. This Part examines the history and judicial precedent concerning each power and then explains the negotiation-accommodation process that typically resolves conflicts between the two powers. This Part concludes with a description of the United States Attorneys investigation, which gave rise to the proposals to change the current process mentioned above. Part II analyzes the arguments in favor of Congress's use of its inherent contempt power to arrest officials who assert the President's claim of executive privilege. Part III deals with the arguments in favor of Congress's conclusive authority to resolve any disputes over executive privilege. Finally, Part IV responds to the calls for more active judicial involvement in executive privilege disputes.

I. THE IMPLIED, BUT NOT ABSOLUTE, POWERS OF CONGRESS AND THE PRESIDENT

To understand whether it is constitutionally permissible to utilize contempt of Congress in executive privilege disputes, it is first necessary to explore the history of two implied powers under the Constitution: first, Congress's implied authority to investigate matters within its legislative power and punish with contempt of Congress those who fail to comply with its investigative demands, and second, the implied power of the executive branch to maintain the confidentiality of executive branch documents the disclosure of which would adversely affect the ability of the President to carry out his constitutionally assigned functions. It is necessary to examine these powers in some depth in order to establish three important points about each power: (1) each power has a significant constitutional history dating back over 200 years; (2) each power has been expressly recognized by the Supreme Court as a power that flows from the Constitution; and (3) neither power is absolute; each must yield under certain circumstances to the conflicting powers of the other branches.

A. *Congress's Investigative and Contempt Powers*

Congress derives its authority to compel the production of documents and testimony not from any provision of the Constitution that expressly authorizes congressional investigations, but rather from the general grant of legislative authority in Article I, section 1 of the Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and

House of Representatives.”²³ Congress’s implied power to investigate is based upon the understanding that, in order to legislate effectively, Congress must be able to investigate and examine the subjects of potential legislation.²⁴

From the time of George Washington until the present day, Congress has utilized this power to investigate scores of different subjects, including investigative oversight of the executive branch.²⁵ For example, during President Washington’s first term, a House committee investigated the ill-fated expedition of General Arthur St. Clair, in which over 600 soldiers were killed in an attack by Native Americans of the Ohio frontier. The House committee was expressly authorized “to call for such persons, papers, and records, as may be necessary to assist their inquiries.”²⁶

Notwithstanding the extensive history of congressional investigations during the nineteenth century, it took some time before the Supreme Court recognized the broad scope of Congress’s investigative power. In the first significant Supreme Court case on this question, *Kilbourn v. Thompson*,²⁷ the Supreme Court took a very narrow reading of Congress’s investigative authority.²⁸ *Kilbourn* arose in response to a congressional investigation into the bankruptcy of a company, in which the United States had a substantial investment.²⁹ A House committee subpoenaed Kilbourn because he was the manager

23 U.S. CONST. art. I, § 1. See generally CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792–1974 (Arthur M. Schlesinger, Jr. & Roger Bruns eds., 1975) [hereinafter CONGRESS INVESTIGATES] (setting forth a detailed history of congressional investigations); ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT (1973) (1928) (discussing Congress’s power to investigate in connection with the Teapot Dome Scandal); JOHN C. GRABOW, CONGRESSIONAL INVESTIGATIONS: LAW AND PRACTICE (1988) (describing Congress’s power to investigate).

24 See LOUIS FISHER, CONSTITUTIONAL CONFLICTS BETWEEN CONGRESS AND THE PRESIDENT 183 (Univ. Press of Kan. 4th ed. 1997) (1978) (noting that “courts have consistently held that the investigative power is available . . . to legislate [and] when a ‘potential’ for legislation exists”).

25 See generally CONGRESS INVESTIGATES, *supra* note 23 (setting forth a detailed history of congressional investigations).

26 3 ANNALS OF CONG. 493 (1792). As we will see later, this investigation gave rise to one of the earliest disputes over executive assertion of a privilege to protect the confidentiality of documents sought by Congress. See *infra* text accompanying notes 347–51.

27 103 U.S. 168 (1880).

28 See *id.* at 189 (noting that English precedent did not support Congress’s punishment of a private citizen for contempt, and deciding the case without determining whether such a power is a necessary one for legislative functioning); William P. Marshall, *The Limits on Congress’s Authority to Investigate the President*, 2004 U. ILL. L. REV. 781, 789 (2004) (stating that *Kilbourn* “rejected rather than affirmed Congress’s power to investigate”).

29 *Kilbourn*, 103 U.S. at 171.

of a D.C. real estate pool in which the company was a participant.³⁰ However, Kilbourn refused to answer questions or produce subpoenaed documents on the ground that “if it could be shown in any way that the Government was interested in [the nature of his business] . . . , or that his testimony would promote the interest of the Government in any way, he would tell everything about it.”³¹ When Kilbourn failed to comply with the committee’s subpoena the full House found him in contempt of Congress, and he was incarcerated in the District of Columbia jail.³²

Kilbourn was released from custody when a federal court granted his habeas corpus petition, and he sued the Speaker of the House, the members of the investigating committee, and the Sergeant-at-Arms (Thompson) for false imprisonment.³³ Kilbourn argued that, because the House had no power to punish him for contempt, his arrest and imprisonment were unlawful, while the Sergeant-at-Arms contended that the contempt citation was lawful and a valid defense to the false imprisonment action.³⁴ When the Supreme Court decided the case, it first held that Congress’s authority was not absolute and unreviewable, but was subject to review by the courts.³⁵ It emphasized that because of the “popular origin” and political nature of the Congress,

[i]t is all the more necessary, therefore, that the exercise of power by this body, when acting separately from and independently of all other depositories of power, should be watched with vigilance, and when called in question before any other tribunal having the right to pass upon it that it should receive the most careful scrutiny.³⁶

Second, the Court held that Kilbourn’s imprisonment for contempt was unlawful because Congress had exceeded its authority by investigating the private affairs of citizens, and because the matter under investigation was the subject of ongoing bankruptcy proceedings.³⁷

Most interestingly, the Court questioned whether Congress had a right to investigate and punish for contempt under any circumstances:

We are of opinion that the right of the House of Representatives to punish the citizen for a contempt of its authority or a breach of its privileges

³⁰ *The Real Estate Pool—Kilbourn in Custody*, N.Y. TIMES, Mar. 15, 1876, at 2.

³¹ *Id.*

³² *Kilbourn*, 103 U.S. at 175.

³³ *Id.* at 170.

³⁴ *Id.* at 181.

³⁵ *Id.* at 192.

³⁶ *Id.*

³⁷ *Id.* at 190–92.

can derive no support from the precedents and practices of the two Houses of the English Parliament, nor from the adjudged cases in which the English courts have upheld these practices. Nor, taking what has fallen from the English judges, and especially the later cases on which we have just commented, is much aid given to the doctrine, that this power exists as one necessary to enable either House of Congress to exercise successfully their function of legislation.³⁸

The Court disclaimed, however, that this conclusion was part of its holding, since the “proposition is one which we do not propose to decide in the present case, because we are able to decide it without passing upon the existence or non-existence of such a power in aid of the legislative function.”³⁹

Kilbourn’s suggestion that Congress might not have the authority to compel production of documents and testimony was emphatically rejected in the 1927 case of *McGrain v. Daugherty*⁴⁰ that arose out of Congress’s investigation of the Teapot Dome scandal, which concerned alleged corruption in the leasing of oil fields that had been reserved for the exclusive use of the Navy.⁴¹ After lengthy Senate investigations in 1922 and 1923, the Senate moved on to investigate Attorney General Harry Daugherty’s failure to prosecute those whose corruption had been revealed in the Senate investigations.⁴²

The purpose of the investigation was so “that the practices and deficiencies which, according to the charges, were operating to prevent or impair its right administration might be definitely ascertained and that appropriate and effective measures might be taken to remedy or eliminate the evil.”⁴³ The committee issued subpoenas to a number of witnesses including Mally S. Daugherty, the brother of the Attorney General.⁴⁴ When Mally Daugherty twice refused to testify in response to Senate subpoenas, he was arrested by John McGrain, one of the Senate’s Deputy Sergeants-at-Arms.⁴⁵

Daugherty argued to the Supreme Court that the Constitution did not authorize Congress to issue subpoenas to a private person to respond under penalty of contempt of Congress.⁴⁶ The Supreme Court disagreed, however, and ruled that both Houses of Congress “possess[ed], not only such powers as are expressly granted to them by

38 *Id.* at 189.

39 *Id.*

40 273 U.S. 135 (1927).

41 See CONGRESS INVESTIGATES, *supra* note 23, at 2385.

42 Marshall, *supra* note 28, at 794.

43 *McGrain*, 273 U.S. at 151.

44 *Id.* at 152.

45 *Id.* at 152–54.

46 *Id.* at 154.

the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective.”⁴⁷ The Court looked to the extensive history of legislative investigations in both England and the United States and concluded that, “[i]n actual legislative practice power to secure needed information by such means has long been treated as an attribute of the power to legislate.”⁴⁸ Notwithstanding the absence of an express constitutional clause authorizing subpoenas and the contempt power to enforce them, the Court held that “the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”⁴⁹ In this particular instance, although the resolution authorizing the Senate investigation did not expressly state that it was in aid of the legislation, it was appropriate to infer a legislative purpose to the investigation:

The only legitimate object the Senate could have in ordering the investigation was to aid it in legislating; and we think the subject-matter was such that the presumption should be indulged that this was the real object. An express avowal of the object would have been better; but in view of the particular subject-matter was not indispensable.⁵⁰

The Court did emphasize, however, that Congress did not have the “power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist” to support its legislative function.⁵¹ The scope of the British Parliament’s investigatory authority is not similarly cabined.⁵²

Even Congress’s investigative power over public affairs is not unlimited. The Supreme Court explained Congress’s need to link the investigative power to a particular legislative inquiry in *Watkins v. United States*.⁵³ *Watkins* involved the appeal of a contempt of Congress conviction by a labor official who had refused to testify before the House Committee on Un-American Activities concerning the identity of persons who had formerly been associated with the Communist Party.⁵⁴ The Court summarized the scope of the investigative power as follows:

⁴⁷ *Id.* at 173.

⁴⁸ *Id.* at 161.

⁴⁹ *Id.* at 174.

⁵⁰ *Id.* at 178.

⁵¹ *Id.* at 173–74.

⁵² See Howard R. Sklamberg, *Investigation Versus Prosecution: The Constitutional Limits on Congress’s Power to Immunize Witnesses*, 78 N.C. L. REV. 153, 181–83 (1999) (describing the British Parliament’s “unchecked power to issue subpoenas for information related to any topic and to punish individuals for contempt”).

⁵³ 354 U.S. 178 (1957).

⁵⁴ *Id.* at 185–86.

The power of Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.⁵⁵

In reversing the defendant's conviction for contempt of Congress, however, the Court focused on Congress's need to connect the investigative power to a specific subject of potential legislative action:

But, broad as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to "punish" those investigated are indefensible.⁵⁶

The Court explained that Congress's investigative authority must also yield to the demands of the Bill of Rights and that the need to establish a nexus between a congressional investigation and a *specific* subject of proposed legislation was particularly strong when an investigation might compromise those rights.⁵⁷

[T]he mere semblance of legislative purpose would not justify an inquiry in the face of the Bill of Rights. The critical element is the existence of, and weight to be ascribed to, the interest of the Congress in demanding disclosures from an unwilling witness. We cannot simply assume, however, that every congressional investigation is justified by a public need that overbalances any private rights affected. To do so would be to abdicate the responsibility placed by the Constitution upon the judiciary to insure that the Congress does not unjustifiably encroach upon an individual's right to privacy nor abridge his liberty of speech, press, religion or assembly.⁵⁸

Congress has at its disposal a number of means to enforce compliance with its subpoenas for testimony and documents. First, each House of Congress has inherent power to cite a disobedient witness for contempt of Congress and to direct the Sergeant-at-Arms to arrest the individual and imprison him until the individual agrees to comply with the congressional subpoena. Second, the criminal contempt of Congress statute permits the Houses of Congress to cite an individual

⁵⁵ *Id.* at 187.

⁵⁶ *Id.*

⁵⁷ *Id.* at 198–99.

⁵⁸ *Id.*

for contempt of Congress and refer the citation to the U.S. Attorney for prosecution for criminal contempt of Congress and possible imprisonment in a federal prison. Finally, Congress has authority to seek civil enforcement of a subpoena and obtain a court order directing an individual to testify or produce documents in compliance with a congressional subpoena.

1. Congress's Inherent Contempt Power

From the very first decade of the Constitution, Congress took the position that it had the right to imprison individuals in order to enforce certain constitutional prerogatives. Congress used this inherent contempt power to enforce its subpoenas for testimony and documents and imprisoned contumacious witnesses until they complied with the subpoena. The first use of Congress's inherent contempt power against a defaulting witness took place in 1800 when a newspaper editor, William Duane, was ordered by Senate resolution to appear before the Senate and "make any proper defense for his conduct in publishing the aforesaid false, defamatory, scandalous, and malicious assertions and pretended information."⁵⁹ After initially appearing before the Senate, Duane refused to return on the ground that he would not receive a fair trial and was subsequently found to be in contempt of Congress and arrested and held in Senate custody for several weeks.⁶⁰ Between 1795 and 1857, Congress initiated fourteen inherent contempt actions, and in eight of those cases the contumacious witness agreed to testify or produce documents after being arrested by the Sergeant-at-Arms.⁶¹

Congress's inherent contempt power extends to the imposition of what is essentially a civil contempt sanction on those who fail to comply with congressional subpoenas.⁶² Under this procedure, a committee may adopt a resolution to request the presiding officer of the chamber to issue an arrest warrant to be executed by the Sergeant-at-Arms, who will bring the witness before the bar of the House.⁶³

⁵⁹ 2 ASHER C. HINDS, *HINDS' PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES*, H.R. DOC. NO. 355, at 1054 (1907).

⁶⁰ *Id.* at 1055–56.

⁶¹ MORTON ROSENBERG & TODD B. TATELMAN, *CONG. RESEARCH SERV., RL 34097 CONGRESS'S CONTEMPT POWER: LAW, HISTORY, PRACTICE, AND PROCEDURE* 20 (2008).

⁶² *See Marshall v. Gordon*, 243 U.S. 521, 541–42 (1917) (noting that Congress's implied power of contempt "does not embrace punishment for contempt as punishment").

⁶³ CARL BECK, *CONTEMPT OF CONGRESS: A STUDY OF THE PROSECUTIONS INITIATED BY THE COMMITTEE OF UN-AMERICAN ACTIVITIES, 1945–1957*, at 4 (1959); RONALD L. GOLDFARB, *THE CONTEMPT POWER* 30–31 (1963).

If the full chamber adopts a resolution ordering confinement of the witness, the witness may be confined in a congressional cell pending compliance with the subpoena.⁶⁴ Because this power is a form of civil contempt, the witness must be released once he complies with the subpoena.⁶⁵ The witness has a right to at least some form of hearing before the legislature before contempt sanctions are imposed,⁶⁶ and he may assert any defenses to the subpoena, including privilege and a lack of congressional authority, either before the committee or the full chamber, or in a habeas corpus proceeding in court.⁶⁷ Neither House has utilized this inherent contempt power since 1932.⁶⁸

Four important Supreme Court decisions defined the extent of Congress's inherent contempt power. The Supreme Court first recognized Congress's inherent contempt power in the 1821 case of *Anderson v. Dunn*,⁶⁹ which involved an action for trespassing against the House Sergeant-at-Arms for assault and battery and false imprisonment brought by a contumacious witness.⁷⁰ The Supreme Court sustained the dismissal of the case against the Sergeant-at-Arms on the ground that the House had inherent authority to punish contempt in order to protect its ability to carry out its constitutional responsibilities.⁷¹ A contrary conclusion, the Court stated,

leads to the total annihilation of the power of the House of Representatives to guard itself from contempts, and leaves it exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may mediate against it. This result is fraught with too much absurdity not to bring into doubt the soundness of any argument from which it is derived. That a deliberate assembly, clothed with the majesty of the people, and

64 See CONGRESSIONAL QUARTERLY'S GUIDE TO CONGRESS 163 (3d ed. 1982) [hereinafter CONGRESSIONAL QUARTERLY GUIDE].

65 See *Marshall*, 243 U.S. at 544 ("Thus we have been able to discover no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify . . .").

66 See *Groppi v. Leslie*, 404 U.S. 496, 507 (1972) (holding that the Wisconsin Assembly violated a contemnor's due process rights when it denied him notice or chance to respond).

67 See BECK, *supra* note 63, at 6-9 (describing the procedure for prosecuting an individual for contempt); GOLDFARB, *supra* note 63, at 62-64 (discussing the nature of contempt proceedings).

68 See CONGRESSIONAL QUARTERLY GUIDE, *supra* note 64, at 163.

69 19 U.S. (6 Wheat) 204 (1821); see also GOLDFARB, *supra* note 63, at 30-33 (examining the *Anderson* case to "illustrate the political misgivings toward application of the English contempt rule to Congress"); Allen B. Moreland, *Congressional Investigations and Private Persons*, 40 S. CAL. L. REV. 189, 194-97 (1967) (suggesting that the importance of *Anderson* was that the Supreme Court "tended to regard the Houses of Congress in the adjudication of contempts as performing a function analogous to that of a court").

70 *Anderson*, 19 U.S. (6 Wheat) at 204-08.

71 *Id.* at 204, 225-27.

charged with the care of all that is dear to them, composed of the most distinguished citizens, selected and drawn together from every corner of a great nation, whose deliberations are required by public opinion to be conducted under the eye of the public, and whose decisions must be clothed with all that sanctity which unlimited confidence in their wisdom and purity can inspire, that such an assembly should not possess the power to suppress rudeness, or repel insult, is a supposition too wild to be suggested.⁷²

The Court was not particularly careful in its constitutional analysis and it cited no constitutional history, case law, or any other precedents to support the conclusion that Congress should have such an inherent contempt power. The Court was unconcerned about the potential for congressional abuse of the contempt power and addressed those concerns by stating only “that respectful deportment . . . will render all apprehension chimerical.”⁷³ The Court limited the contempt power to “the least possible power adequate to the end proposed.”⁷⁴ Moreover, punishment for contempt must be limited to the life of the legislative body which “ceases to exist on the moment of its adjournment or periodical dissolution. It follows, that imprisonment must terminate with that adjournment.”⁷⁵ This power corresponds in many respects to the civil contempt power of a grand jury.⁷⁶

Thereafter, in *Kilbourn v. Thompson*,⁷⁷ the Court held that Congress’s contempt power was reviewable by the courts, and that, because of the “popular origin” and political nature of Congress, the judiciary should “most careful[ly] scrutin[ize]” this assertion of authority.⁷⁸ Next, the Supreme Court further explained the precise nature of Congress’s inherent contempt power in *In re Chapman*,⁷⁹ where it rejected a challenge to a contempt of Congress conviction on the ground that the prosecution—first under a criminal statute and then punishment pursuant to Congress’s inherent contempt power—created double jeopardy for the same offense and violation of the

⁷² *Id.* at 228–29.

⁷³ *Id.* at 235.

⁷⁴ *Id.* at 231 (emphasis omitted) (internal quotation marks omitted).

⁷⁵ *Id.*

⁷⁶ See *Shillitani v. United States*, 384 U.S. 364, 371–72 (1966) (stating that civil contempt expires at the conclusion of a grand jury).

⁷⁷ 103 U.S. 168 (1880). For the factual setting from which this case arose, see *supra* notes 27–37 and accompanying text. The Court concluded that the contempt citation was invalid because the investigation to which it related exceeded the permissible scope of congressional inquiry. *Kilbourn*, 103 U.S. at 190–92.

⁷⁸ *Id.* at 192.

⁷⁹ 166 U.S. 661 (1897).

Fifth Amendment of the Constitution.⁸⁰ The Court ruled “the contumacious witness is not subjected to jeopardy twice for the same offence, since the same act may be an offence against one jurisdiction and also an offence against another.”⁸¹ So, because Congress’s inherent contempt of Congress authority is essentially the equivalent of civil contempt, it does not violate the double jeopardy clause to utilize that power and later prosecute the contumacious witness for criminal contempt of Congress.⁸²

In 1917, the Court imposed additional constraints on Congress’s inherent contempt power in the case of *Marshall v. Gordon*.⁸³ In *Marshall*, the U.S. District Attorney for New York was arrested by the House Sergeant-at-Arms after the House found him in contempt of Congress because of a “defamatory and insulting letter” that he had written concerning the chairman of the House Judiciary Committee on a petition for habeas corpus.⁸⁴ The Court ordered the petitioner released. The Court emphasized that Congress did not possess the broad quasi-judicial powers of the House of Commons:

[T]he possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution.⁸⁵

2. *The Criminal Contempt of Congress Statute*

The criminal contempt statute was enacted in 1857⁸⁶ after a congressional investigation of a newspaper reporter, who refused to answer questions posed by a congressional investigating committee.⁸⁷ Because committee members believed the inherent contempt process too cumbersome to effectively compel a witness to testify, they introduced a bill that eventually became the contempt of Congress statute

⁸⁰ *Id.* at 671.

⁸¹ *Id.* at 672.

⁸² *Id.* (“[An] indictable statutory offence[] may be punished as such, while the offenders may likewise be subjected to punishment for the same acts as contempt, the two being . . . capable of standing together.”).

⁸³ 243 U.S. 521 (1917).

⁸⁴ *Id.* at 531–32.

⁸⁵ *Id.* at 536.

⁸⁶ Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.

⁸⁷ See EBERLING, *supra* note 23, at 302–04.

authorizing criminal prosecution of a person cited by either House for contempt of Congress.⁸⁸ The contempt statute allows either House to refer a contempt citation to the United States attorney for presentation to a grand jury.⁸⁹ In the ensuing prosecution, the witness may present any defenses to the subpoena, including applicable privileges, but if the judge rejects the defenses, the defendant will be convicted of the misdemeanor offense for which the maximum penalty is one year in jail and a fine of not more than \$1000.⁹⁰

There are a number of differences between Congress's inherent contempt power and a citation for contempt under the criminal contempt of Congress statute. First, a witness may immediately challenge Congress's use of the inherent contempt power by a petition for habeas corpus,⁹¹ and, if the challenge is rejected, the witness may avoid

⁸⁸ *Id.*

⁸⁹ See 2 U.S.C. §§ 192, 194 (2006), which state in relevant part as follows:

Every person who having been summoned as a witness by the authority of either House of Congress to give testimony to give or to produce papers upon any matter under inquiry before either House . . . or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than \$1,000 nor less than \$100 and imprisonment in a common jail for not less than one month nor more than twelve months.

....

Whenever a witness summoned as mentioned in section 192 of this title fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question pertinent to the subject under inquiry before either House . . . or any committee or subcommittee of either House of Congress, and the fact of such failure or failures is reported to either House while Congress is in session or when Congress is not in session, a statement of fact constituting such failure is reported to and filed with the President of the Senate or the Speaker of the House, it shall be the duty of the said President of the Senate or Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be, to the appropriate United States attorney, whose duty shall be to bring the matter before the grand jury for its action.

Congress enacted the criminal contempt statute in 1857 after a frustrating attempt to question a *New York Times* correspondent who had refused to answer questions put to him by a select committee appointed by the House to investigate charges of bribery against certain representatives. See *supra* notes 87 and 88 and accompanying text. As a result of the committee's unavailing efforts to obtain the reporter's testimony, the committee chairman introduced a bill designed "more effectually to enforce the attendance of witnesses on the summons of either House of Congress, and to compel them to discover testimony." CONG. GLOBE, 34TH CONG., 3D SESS. 404 (1857).

⁹⁰ 2 U.S.C. § 192; see also Goldfarb, *supra* note 63, at 40–41 (describing procedures "customarily followed when witnesses before congressional committees refuse to answer pertinent questions or to produce subpoenaed books or records").

⁹¹ See, e.g., *Marshall v. Gordon*, 243 U.S. 521, 548 (1917) (holding that "the court below erred in refusing to grant the writ of habeas corpus"); *Kilbourn v. Thompson*, 103 U.S. 168, 177 (1880) (noting that Kilbourn's writ of habeas corpus was granted and he was released from the custody of the Sergeant-at-Arms).

any penalty by offering testimony or producing the documents.⁹² Criminal contempt, however, may not be purged by agreeing to testify or produce documents; once a witness refuses to respond to a lawful subpoena, the witness has committed a crime and is subject to criminal sanctions.⁹³ This difference is especially important in the context of congressional investigations because witnesses may not bring a judicial challenge to a subpoena prior to enforcement in the contempt process.⁹⁴ As a result, to challenge a congressional subpoena, a witness must place himself at risk of criminal contempt charges that may not be purged by subsequent compliance with a subpoena.

3. *Enforcement of a Congressional Subpoena Through a Civil Judicial Proceeding*

In 1978, Congress enacted a statute that gave the Senate, but not the House, the authority to file a civil action to enforce a subpoena for documents or testimony.⁹⁵ Typically, the Senate Legal Counsel brings the lawsuit on behalf of the Senate or a committee or subcommittee.⁹⁶ The statute authorizes a federal district court to order

⁹² See *Marshall*, 243 U.S. at 544 (finding “no single instance where in the exertion of the power to compel testimony restraint was ever made to extend beyond the time when the witness should signify his willingness to testify”).

⁹³ See, e.g., *United States v. Brewster*, 154 F. Supp. 126, 136 (D.D.C. 1957) (“[W]hile purgation by compliance relieves from a ‘civil’ contempt, it is no longer a defense to a ‘criminal’ contempt charge.”), *rev’d on other grounds*, 255 F.2d 899 (D.C. Cir. 1958) (holding that the subject matter investigated by the committee’s jurisdiction); see also *United States v. Costello*, 198 F.2d 200, 204 (2d Cir. 1952) (“Certainly the refusal to testify was an act in contempt of the Committee for which the defendant was subject to the punishment prescribed by the statute.”).

⁹⁴ See, e.g., *Sanders v. McClellan*, 463 F.2d 894, 902–03 (D.C. Cir. 1972) (considering the right of Congress to make inquiries of the plaintiff as greater than the potential chill effect of the subpoena, thus not warranting injunctive relief); *Ansara v. Eastland*, 442 F.2d 751, 753–54 (D.C. Cir. 1971) (denying plaintiff’s claim for emergency injunctive relief, in which he sought to have subpoenas voided).

⁹⁵ Ethics in Government Act of 1978, Pub. L. No. 95-521, §§ 703, 705, 92 Stat. 1824, 1877–80 (codified as amended at 2 U.S.C. §§ 288b, 288d, and 28 U.S.C. § 1365). The conference report on this bill indicates that the civil enforcement mechanism was limited to the Senate because the relevant House committees had not yet had an opportunity to consider whether such authority should be granted to the House. H.R. REP. NO. 95-1756, at 80 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N., 4381, 4396.

⁹⁶ ROSENBERG & TATELMAN, *supra* note 61, at 34 n.206 (“A resolution directing the Senate Legal Counsel to bring an action to enforce a committee or subcommittee subpoena must be reported by a majority of the members voting, a majority being present, of the full committee. The report filed by the committee must contain a statement of (a) the procedure employed in issuing the subpoena; (b) any privileges or objections raised by the recipient of the subpoena; (c) the extent to which the party has already complied with the subpoena; and (d) the comparative effectiveness of the criminal and civil statutory contempt procedures and a trial at the bar of the Senate.”).

compliance with the Senate subpoena, and, if an individual fails to comply with the court order, the court may find the individual in contempt of court, with both civil and criminal sanctions that are typically available for contempt of court.⁹⁷ Since the enactment of the statutory provision, the Senate has sought civil enforcement of a subpoena for documents or testimony at least six times.⁹⁸ The judicial enforcement mechanism has the benefit of allowing a court to resolve any legal issues concerning Congress's power to obtain testimony and documents, including a witness's argument based on the privilege against self-incrimination, lack of compliance with congressional procedures, or an inability to comply with the subpoena.⁹⁹ The statute contains an express provision stating that it does not authorize civil enforcement of a subpoena directed to an officer or employee of the Federal Government acting within his official capacity, but the Senate report on the provision also disclaimed any intent to restrict such an action if authorized by other sources of authority.¹⁰⁰ The Senate report states:

This jurisdictional statute applies to a subpoena [sic] directed to any natural person or entity acting under color of state or local authority. By the specific terms of the jurisdictional statute, it does not apply to a subpoena directed to an officer or employee of the Federal Government acting within his official capacity. In the last Congress there was pending in the Committee on Government Operations legislation directly addressing the problems associated with obtaining information from the Executive Branch. This exception in the statute is not intended to be a Congressional finding that the federal courts do not now have the authority to hear a civil action to enforce a subpoena against an officer or an employee of the Federal Government. However, if the federal courts do not now have this authority, this statute does not confer it.¹⁰¹

Even without the authority conferred by the Senate statute, both Houses can pursue civil enforcement of a subpoena when authorized by congressional resolution.¹⁰² For example, the House has passed

97 28 U.S.C. §§ 1365(a)–(b) (2006); *see also* S. REP. NO. 95-170, at 41 (1977), *reprinted in* 1978 U.S.C.C.A.N. 4216, 4257.

98 ROSENBERG & TATELMAN, *supra* 61, at 36.

99 *Id.*; *see* S. REP. NO. 95-170, at 88–89, 1978 U.S.C.C.A.N., at 4309.

100 28 U.S.C. § 1365(a).

101 S. REP. NO. 95-170, at 91–92, 1978 U.S.C.C.A.N., at 4307–08 (citation omitted).

102 Indeed, the Senate has a standing order, which was adopted in 1928, that authorizes a committee to seek a court order to enforce its subpoenas. The resolution states:

Resolved, That hereafter any committee of the Senate is hereby authorized to bring suit on behalf of and in the name of the United States in any court of competent jurisdiction if the committee is of the opinion that the suit is necessary to the adequate performance of the powers vested in it or the duties imposed upon it by the Constitution, resolution of the Senate, or other law. Such suit may be brought and prosecuted to final determination irrespective of whether or not the

resolutions granting at least five special or select committees subpoena authority and the ability to seek judicial enforcement of the subpoenas.¹⁰³ These inquiries include the October surprise (Iranian hostage) investigation,¹⁰⁴ the White House travel office inquiry,¹⁰⁵ the House campaign finance investigation,¹⁰⁶ the Select Committee on National Security Concerns inquiry into arms sales to China,¹⁰⁷ and the Teamsters election investigation.¹⁰⁸ In any action brought pursuant to this authority, a federal court should have jurisdiction under the general federal question statute.¹⁰⁹ Although a Nixon-era case rejected jurisdiction under 28 U.S.C. § 1331, the ground for its decision was the failure of the lawsuit to meet the jurisdictional amount requirement then contained in the federal question statute.¹¹⁰

The deletion of the amount-in-controversy requirement from the federal question statute should have eliminated any bar to federal question jurisdiction over congressional suits to enforce subpoenas.¹¹¹ This conclusion is confirmed by the recent suit brought by the House of Representatives to enforce its subpoenas against Joshua Bolten and Harriet Miers, in which jurisdiction rested upon a resolution adopted by the House of Representatives, and federal subject matter jurisdiction was authorized by the general federal question statute.¹¹² There

Senate is in session at the time the suit is brought or thereafter. The committee may be represented in the suit either by such attorneys as it may designate or by such officers of the Department of Justice as the Attorney General may designate upon the request of the committee. No expenditures shall be made in connection with any such suit in excess of the amount of funds available to the said committee. As used in this resolution, the term "committee" means any standing or special committee of the Senate, or any duly authorized subcommittee thereof, or the Senate members of any joint committee.

STANDING ORDERS OF THE SENATE 161 (2008). The Committee Research Service has opined that this "Standing Order appears to have never been invoked and, therefore, its validity remains an open question." ROSENBERG & TATELMAN, *supra* note 61, at 35 n.212.

¹⁰³ ROSENBERG & TATELMAN, *supra* note 61, at 38.

¹⁰⁴ See H.R. Res. 258, 102d Cong. (1992).

¹⁰⁵ See H.R. Res. 369, 104th Cong. (1996).

¹⁰⁶ See H.R. Res. 167, 105th Cong. (1997).

¹⁰⁷ See H.R. Res. 463, 105th Cong. (1998).

¹⁰⁸ See H.R. Res. 507, 105th Cong. (1998).

¹⁰⁹ 28 U.S.C. § 1331 (2006); ROSENBERG & TATELMAN, *supra* note 61, at 42.

¹¹⁰ See *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 366 F. Supp. 51, 59–61 (D.D.C. 1973) (finding that the \$10,000 amount-in-controversy requirement of the federal question jurisdiction statute was not met).

¹¹¹ See Todd D. Peterson, *Prosecuting Executive Branch Officials for Contempt of Congress*, 66 N.Y.U. L. REV. 563, 620 n.323 (1991) (noting that the amount-in-countroversy requirement, which "effectively barred Congress's enforcement of its Watergate subpoenas," is no longer there).

¹¹² See *Comm. on the Judiciary v. Miers*, 558 F. Supp. 2d 53, 64–65 (D.D.C. 2008) (holding that "the monetary threshold . . . no longer exists and there is no other impediment to invoking § 1331 subject matter jurisdiction here").

remain significant questions, however, whether a federal court should entertain a congressional lawsuit to enforce a subpoena against an executive official who has asserted the President's claim of executive privilege or dismiss the lawsuit on the ground that resolution of the dispute is better left to the political process.¹¹³

B. *The President's Right to Claim Executive Privilege*

Just as with Congress's assertion of its implied authority to investigate and compel production of documents and testimony, Presidents have asserted the right to protect the confidentiality of certain executive branch documents since the end of the eighteenth century.¹¹⁴ Although the scope and extent of this privilege has been, and continues to be, the subject of extensive debate, the Supreme Court expressly recognized a constitutionally based right of the President to protect the confidentiality of certain kinds of executive branch documents in *United States v. Nixon*.¹¹⁵ In *Nixon*, the Court enforced a subpoena issued by the Watergate special prosecutor, Leon Jaworski, for tapes of conversations between President Nixon and his advisors in the Oval Office, but, in so doing, the Court stated that the President's claim of privilege warrants an initial presumption of validity and that a privilege to preserve the confidentiality of executive branch documents is

¹¹³ See discussion *infra* Parts IV–V.

¹¹⁴ See, e.g., RAOUL BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH (1974); MARK J. ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY (1994) [hereinafter ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY]; Raoul Berger, *Congressional Subpoenas to Executive Officials*, 75 COLUM. L. REV. 865 (1975); Jeffrey L. Bleich & Eric B. Wolff, *Executive Privilege and Immunity: The Questionable Role of the Independent Counsel and the Courts*, 14 ST. JOHN'S J. LEGAL COMMENT. 15 (1999); Archibald Cox, *Executive Privilege*, 122 U. PA. L. REV. 1383 (1974); Norman Dorsen & John H. F. Shattuck, *Executive Privilege, the Congress and the Courts*, 35 OHIO ST. L.J. 1 (1974); Rex E. Lee, *Executive Privilege, Congressional Subpoena Power, and Judicial Review: Three Branches, Three Powers, and Some Relationships*, 1978 BYU L. REV. 231 (1978); Randall K. Miller, *Congressional Inquests: Suffocating the Constitutional Prerogative of Executive Privilege*, 81 MINN. L. REV. 631 (1997); Bernard Schwartz, *Executive Privilege and Congressional Investigatory Power*, 47 CAL. L. REV. 3 (1959); Peter M. Shane, *Legal Disagreement and Negotiation in a Government of Laws: The Case of Executive Privilege Claims Against Congress*, 71 MINN. L. REV. 461 (1987); Peter M. Shane, *Negotiating for Knowledge: Administrative Responses to Congressional Demands for Information*, 44 ADMIN. L. REV. 197 (1992); Abraham D. Sofaer, *Executive Power and the Control of Information: Practice Under the Framers*, 1977 DUKE L.J. 1 (1977); Symposium, *Executive Privilege and the Clinton Presidency*, 8 WM. & MARY BILL RTS. J. 535 (2000); Symposium, *United States v. Nixon*, 22 UCLA L. REV. 1 (1974); Symposium, *United States v. Nixon: The Prelude*, 83 MINN. L. REV. 1061 (1999); Irving Younger, *Congressional Investigations and Executive Secrecy: A Study in the Separation of Powers*, 20 U. PITT. L. REV. 755 (1959); Joel D. Bush, Note, *Congressional-Executive Access Disputes: Legal Standards and Political Settlements*, 9 J.L. & POL. 719 (1993).

¹¹⁵ 418 U.S. 683 (1974).

“fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution.”¹¹⁶ The documents subject to such a presidential claim of privilege relate to several different categories of executive branch information.

First, the courts have been most deferential to the President’s need to maintain the confidentiality of documents related to state secrets and national security. The *Nixon* Court acknowledged in dictum the “need to protect military, diplomatic, or sensitive national security secrets.”¹¹⁷ The Court described the scope and history of the protection afforded this class of documents as follows:

As to these areas of Art[icle] II duties the courts have traditionally shown the utmost deference to presidential responsibilities. In *C. & S. Air Lines v. Waterman S.S. Corp.*, . . . dealing with Presidential authority involving foreign policy considerations, the Court said:

“The President, both as Commander-in-Chief and as the Nation’s organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”

In *United States v. Reynolds*, dealing with a claimant’s demand for evidence in a Tort Claims Act case against the Government, the Court said:

“It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.”

No case of the Court, however, has extended this high degree of deference to a President’s generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.¹¹⁸

Similarly, in another case, the Supreme Court commented that the President’s “authority to classify and control access to information bearing on national security . . . flows primarily from . . . [the Commander-in-Chief clause] and exists quite apart from any explicit congressional grant.”¹¹⁹

116 *Id.* at 708.

117 *Id.* at 706.

118 *Id.* at 710–11 (citations omitted).

119 *Dep’t of Navy v. Egan*, 484 U.S. 518, 527 (1988).

In *Nixon*, the Court also recognized the existence of a constitutionally based privilege over documents containing deliberative communications between the President and his advisors. The Court identified the basis for this privilege as

the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.¹²⁰

According to the Court in *Nixon*, the need to maintain confidentiality over certain kinds of documents dates back to the founding of the Republic:

There is nothing novel about governmental confidentiality. The meetings of the Constitutional Convention in 1787 were conducted in complete privacy. Moreover, all records of those meetings were sealed for more than 30 years after the Convention. Most of the Framers acknowledge that without secrecy no Constitution of the kind that was developed could have been written.¹²¹

The Court then went on to explain that the right to preserve the confidentiality of executive branch documents was implied by the language and structure of the Constitution:

Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art[icle] II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.¹²²

In a later case involving access to information from President Clinton's Health Care Task Force, the D.C. Circuit elaborated on this rationale for confidentiality by explaining that the Framers vested the executive power in one person "for the very reason that he might maintain secrecy in the executive operations."¹²³ Secrecy enables a President to "deliberate in confidence," and "to decide and to act quickly—a quality lacking in the government established by the Articles of Confederation."¹²⁴

¹²⁰ *Nixon*, 418 U.S. at 705.

¹²¹ *Id.* at 705 n.15 (citations omitted).

¹²² *Id.* at 705–06 (footnote omitted).

¹²³ *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 909 (D.C. Cir. 1993).

¹²⁴ *Id.*

Additionally, although not discussed in *Nixon*, the executive branch has claimed the right to protect the confidentiality of open investigative files.¹²⁵ Attorney General Robert H. Jackson set forth the most thorough explanation of the basis for this privilege in an opinion written in 1941.¹²⁶ Jackson refused a request from the House Committee on Naval Affairs for FBI and DOJ papers regarding the latter's investigations of "labor disturbances" among naval contractors.¹²⁷ As grounds for his refusal to disclose the documents, Attorney General Jackson identified a number of policy rationales. First, he stated:

Disclosure of the reports could not do otherwise than seriously prejudice law enforcement. Counsel for a defendant or prospective defendant, could have no greater help than to know how much or how little information the Government has, and what witnesses or sources of information it can rely upon. This is exactly what these reports are intended to contain.¹²⁸

Second, Attorney General Jackson stated that disclosure of information from open investigative files could compromise confidential informants, embarrassing them "sometimes in their employment, sometimes in their social relations, and in extreme cases might even endanger their lives," and that the DOJ "regard[ed] the keeping of faith with confidential informants as an indispensable condition of future efficiency."¹²⁹

Finally, Attorney General Jackson maintained that the production of open criminal investigative files could damage the reputations of individuals discussed in the files:

Disclosure of information contained in the reports might also be the grossest kind of injustice to innocent individuals. Investigative reports include leads and suspicions, and sometimes even the statements of malicious or misinformed people. Even though later and more complete reports exonerate the individuals, the use of particular or selected reports might constitute the grossest injustice, and we all know that a correction never catches up with an accusation.¹³⁰

A later memorandum from the department's Office of Legal Counsel ("OLC") identified an additional reason for withholding information from open investigative files: the potential for congressional interference and influence over who should be prosecuted for

¹²⁵ See FISHER, *supra* note 24; Peterson, *supra* note 111, at 1379–85.

¹²⁶ See 40 Op. Att'y Gen. 45 (1941).

¹²⁷ *Id.*

¹²⁸ *Id.* at 46.

¹²⁹ *Id.* at 46–47.

¹³⁰ *Id.* at 47.

violations of the criminal law. “[T]he executive cannot effectively investigate if Congress is, in a sense, a partner in the investigation. If a congressional committee is fully apprised of all details of an investigation as the investigation proceeds, there is a substantial danger that congressional pressures will influence the course of the investigation.”¹³¹

The OLC reaffirmed this conclusion in a 1986 opinion for the Attorney General concerning congressional demands for information from investigations and pursuant to the Independent Counsel Act.¹³² Although acknowledging that Congress has

a legitimate legislative interest in overseeing the Department’s enforcement of the Independent Counsel Act and relevant criminal statutes . . . [,] Congress could not justify an investigation based on its disagreement with the prosecutorial decision regarding appointment of an independent counsel for a particular individual. Congress simply cannot constitutionally second-guess that decision.¹³³

As a result, “the policy of the Executive Branch throughout our Nation’s history has generally been to decline to provide committees of Congress with access to, or copies of, open law enforcement files except in extraordinary circumstances.”¹³⁴

The courts have not, with perhaps the one exception of military and diplomatic secrets,¹³⁵ treated claims of executive privilege as absolute. The courts have recognized that the President’s interests in preserving the confidentiality of documents may conflict with the interests of the judicial branch in obtaining information necessary to a criminal or civil case or the interest of Congress in obtaining information necessary to a congressional investigation. In such cases, the courts have agreed to adjudicate disputes, and they have generally used a balancing test to determine which branch’s interest is more powerful in the particular case. For example, in *Nixon*, the Court acknowledged that, although the President’s need to freely explore alternatives in pre-decisional deliberations justified “a presumptive privilege for Presidential communications,” the privilege had to yield in

¹³¹ Memorandum from Thomas E. Kauper, Deputy Assistant Att’y Gen., Office of Legal Counsel, to Edward L. Morgan, Deputy Counsel to the President, 2 (Dec. 19, 1969), *cited in* Cong. Subpoenas of Dep’t of Justice Investigative Files, 8 Op. O.L.C. 252, 263 (1984).

¹³² Response to Cong. Requests for Info. Re. Decisions Made Under the Indep. Counsel Act, 10 Op. O.L.C. 68, 68 (1986).

¹³³ *Id.* at 74.

¹³⁴ *Id.* at 76.

¹³⁵ In *United States v. Nixon*, the Court indicated that information relating to “military or diplomatic secrets” might be absolutely privileged. 418 U.S. 683, 710–11 (1974).

that case to the “demonstrated, specific need for evidence in a pending criminal trial.”¹³⁶

The Supreme Court used a similar balancing approach in *Nixon v. Administrator of General Services*,¹³⁷ in which the Court addressed a constitutional challenge to the statute that transferred authority over President Richard Nixon’s presidential records to the National Archives for review and possible disclosure to the public.¹³⁸ President Nixon argued that executive privilege prevented Congress from mandating the disclosure of these records, while Congress argued that it had a valid legislative interest in providing for retention and possible disclosure of the documents.¹³⁹ As a matter of separation of powers methodology, the Supreme Court determined that in deciding whether the statute

disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions. Only where the potential for disruption is present must we then determine whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress.¹⁴⁰

In later cases, the D.C. Circuit took up the balancing test utilized in *Nixon* in order to resolve information disputes between the executive branch and the courts, and the executive branch and Congress. One example of the former involved an executive privilege claim in response to an independent counsel’s subpoena for documents in connection with the investigation of Secretary of Agriculture Michael Espy.¹⁴¹ In that case, the court evaluated the executive’s need for confidentiality by distinguishing between a general deliberative process privilege that applied throughout the executive branch and a narrower presidential communications privilege that applied to the President and his close advisors; the court required a more compelling

¹³⁶ *Id.* at 708, 713.

¹³⁷ 433 U.S. 425 (1977).

¹³⁸ *Id.* at 429.

¹³⁹ *Id.* at 430–33.

¹⁴⁰ *Id.* at 443 (citation omitted). The Supreme Court has utilized a similar balancing approach in determining whether the President and his subordinates had immunity from civil lawsuits for damages. See *Harlow v. Fitzgerald*, 457 U.S. 800, 806–19 (1982) (holding that White House advisors have qualified immunity from civil suits for damages in connection with the performance of their official duties); *Nixon v. Fitzgerald*, 457 U.S. 731, 744–57 (1982) (holding that the President is absolutely immune from similar civil actions).

¹⁴¹ *In re Sealed Case*, 121 F.3d 729 (D.C. Cir. 1997).

showing of need to overcome the latter privilege.¹⁴² The court ruled that the judicial branch could prevail over the confidentiality of presidential communications only if the party seeking documents could prove “first, that each discrete group of the subpoenaed materials likely contains important evidence; and second, that this evidence is not available with due diligence elsewhere.”¹⁴³ The court added that “the factors of importance and unavailability are also used by courts in determining whether a sufficient showing of need has been demonstrated to overcome other qualified executive privileges, such as the deliberative process privilege or the law-enforcement investigatory privilege.”¹⁴⁴ The D.C. Circuit utilized a similar balancing approach in assessing an executive privilege claim in response to a subpoena from independent counsel Kenneth Starr in connection with the Monica Lewinsky investigation.¹⁴⁵

The courts have usually been reluctant to adjudicate information conflicts between the executive branch and Congress. In *Nixon*, the Court explicitly noted that it expressed no view on whether and when an executive privilege claim could prevail against a congressional subpoena.¹⁴⁶ The lower courts have dealt with congressional-executive privilege disputes on only four occasions, and have reached the merits in only two of those cases. In *Senate Select Committee on Presidential Campaign Activities v. Nixon*,¹⁴⁷ the D.C. Circuit entertained a lawsuit brought by the Senate committee investigating the Watergate break-in and related matters to enforce its subpoena to President Nixon for tape recordings of certain conversations between the President and the White House Counsel, John Dean.¹⁴⁸ The district court had sided with the President after “weighing . . . the public interest protected by the President’s claim of privilege against the public interests that would be served by disclosure to the Committee in this particular instance.”¹⁴⁹

¹⁴² See *id.* at 736–40, 745–46 (finding that the presidential communications privilege is “more difficult to surmount,” since a party seeking to overcome it must “always provide a focused demonstration of need”).

¹⁴³ *Id.* at 754.

¹⁴⁴ *Id.* at 755.

¹⁴⁵ *In re Lindsey* (Grand Jury Testimony), 158 F.3d 1263, 1266–67 (D.C. Cir. 1998).

¹⁴⁶ See *United States v. Nixon*, 418 U.S. 683, 712 n.19 (1974) (stating that the Court was not “concerned with the balance between the President’s” confidentiality interest and congressional demands for information).

¹⁴⁷ 498 F.2d 725 (D.C. Cir. 1974).

¹⁴⁸ *Id.* at 726.

¹⁴⁹ *Id.* at 728 (internal quotation marks omitted).

The court of appeals recognized that each branch had a significant constitutional interest at stake in the litigation, and it used a balancing test similar to the one it had used to resolve the dispute between the special prosecutor and the President over access to recordings in the Oval Office.¹⁵⁰ The court first addressed the issue of the proper methodology for resolving a particular dispute between the President and Congress over congressional access to confidential executive branch documents. The court stated:

So long as the presumption that the public interest favors confidentiality can be defeated only by a strong showing of need by another institution of Government—a showing that the responsibilities of the institution cannot responsibly be fulfilled without access to records of the President's deliberations—we believed in *Nixon v. Sirica*, and continue to believe, that the effective functioning of the presidential office will not be impaired.¹⁵¹

In applying this balancing approach, the court concluded that, because the House Judiciary Committee was already in possession of the tapes, the Senate committee's "need for the subpoenaed tapes is, from a congressional perspective, merely cumulative."¹⁵² Therefore, the court stated that:

The sufficiency of the Committee's showing of need has come to depend, therefore, entirely on whether the subpoenaed materials are critical to the performance of its legislative functions. There is a clear difference between Congress's legislative tasks and the responsibility of a grand jury, or any institution engaged in like functions. While fact-finding by a legislative committee is undeniably a part of its tasks, legislative judgments normally depend more on the predicted consequences of proposed legislative actions and their political acceptability, than on precise reconstruction of past events¹⁵³

In this particular case, the court ruled that, given the fact that the tapes were already in possession of the House committee, the Senate committee's need for the tapes was less weighty than the President's interest in preserving them from disclosure.¹⁵⁴

In *United States v. AT&T Co.*,¹⁵⁵ the DOJ brought a lawsuit to enjoin AT&T from complying with a House subcommittee subpoena that demanded AT&T produce DOJ letters that requested the company's

150 *Id.* at 729–31; *see also* *Nixon v. Sirica*, 487 F.2d 700, 716–18 (D.C. Cir. 1973) (asserting that application of executive privilege depends on the "weighing of the public interest protected by the privilege against the public interests that would be served by disclosure in that particular case").

151 *Senate Select Comm.*, 498 F.2d at 730.

152 *Id.* at 732.

153 *Id.*

154 *Id.* at 732–33.

155 567 F.2d 121 (D.C. Cir. 1977).

assistance in implementing certain national security wiretaps.¹⁵⁶ After the subcommittee first issued its subpoenas, the DOJ had objected to the investigative demand, and it began to negotiate a compromise that would allow the subcommittee to obtain necessary information without compromising national security.¹⁵⁷ The DOJ brought the lawsuit after negotiations with the subcommittee collapsed, and the subcommittee chairman intervened as a defendant in the case.¹⁵⁸ The D.C. Circuit initially declined to resolve the dispute and requested the parties return to the negotiating table.¹⁵⁹ After the negotiations between the DOJ and the subcommittee again collapsed, the court, while not definitively rejecting the possibility that it would resolve the dispute itself, once again directed the parties to return to the negotiating table because a negotiated settlement was preferable to a judicially imposed decision:

Given our perception that it was a deliberate feature of the constitutional scheme to leave the allocation of powers unclear in certain situations, the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system. The Constitution contemplates such accommodation. Negotiation between the two branches should thus be viewed as a dynamic process affirmatively furthering the constitutional scheme.¹⁶⁰

The court suggested a framework for a possible settlement of the dispute and directed the parties to consider a compromise based upon this framework.¹⁶¹ Ultimately the parties worked out a compromise and jointly requested the court to dismiss the lawsuit.¹⁶²

In 1983, the D.C. District Court dismissed a lawsuit brought by the DOJ to challenge a contempt of Congress citation issued to EPA Administrator Anne Gorsuch.¹⁶³ The EPA Administrator had refused to comply with a House subcommittee subpoena for documents in connection with the subcommittee's investigation of the EPA's enforcement of the Superfund statute.¹⁶⁴ As discussed in greater detail be-

¹⁵⁶ *Id.* at 122–23.

¹⁵⁷ *Id.* at 123–24.

¹⁵⁸ *Id.* at 124.

¹⁵⁹ *Id.*; see also *United States v. AT&T Co.*, 551 F.2d 384, 395 n.18 (D.C. Cir. 1976) (describing a possible settlement agreement among the parties).

¹⁶⁰ *AT&T Co.*, 567 F.2d at 130 (footnote omitted).

¹⁶¹ *Id.* at 131–33.

¹⁶² See ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY, *supra* note 114, at 95–96.

¹⁶³ *United States v. House of Representatives*, 556 F. Supp. 150 (D.D.C. 1983).

¹⁶⁴ *Id.* at 151.

low,¹⁶⁵ this case involved the first contempt of Congress citation issued to an official who had asserted the President's claim of executive privilege.¹⁶⁶ Notwithstanding the unique nature of the constitutional confrontation between the branches, the district court followed earlier D.C. Circuit opinions refusing to adjudicate pre-enforcement challenges to congressional subpoenas on the ground of equitable discretion, and it declined to resolve the case on the merits.¹⁶⁷ Instead, the court stated: "The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement."¹⁶⁸

In summary, then, the case law on judicial resolution of disputes over other branches' access to confidential executive branch information has established a number of important principles. First, with respect to judicial access to such confidential information, the Supreme Court has recognized a presumptive privilege for documents reflecting a deliberative process in the White House. More significantly, the Court created a methodological approach for resolving the competing claims between the executive and judicial branches. The courts must weigh the potential impact on the ability of the executive branch to perform its constitutional functions if documents are disclosed against the impact on the ability of the judiciary to perform its functions if the documents are withheld. The courts have shown little reluctance to decide these questions in appropriate cases where disputes arise over access to confidential executive branch documents for use in judicial proceedings. In implementing the balancing test, the courts have performed a contextually specific analysis of the particular documents requested and have ordered disclosure where there was a demonstrable need for the documents in a judicial proceeding that could not be met through some alternative methods.

Although the Supreme Court has not expressly addressed disputes between the executive branch and Congress, the D.C. Circuit has played a pivotal role in defining the rights of the respective parties and the preferable method for resolving such disputes. First, this court has recognized that the President has a right to assert executive

¹⁶⁵ See *infra* discussion accompanying notes 347–51.

¹⁶⁶ See Peterson, *supra* note 111, at 571–74 (discussing the Gorsuch controversy and its resolution).

¹⁶⁷ See *House of Representatives*, 556 F. Supp. at 152 (citing, *inter alia*, *Sanders v. McClellan*, 463 F.2d 894, 899 (D.C. Cir. 1972), and *Ansara v. Eastland*, 442 F.2d 751, 754 (D.C. Cir. 1971)).

¹⁶⁸ *House of Representatives*, 556 F. Supp. at 153.

privilege in response to a congressional request for documents or testimony and has rejected claims that Congress has a unilateral right to obtain any documents that it believes are necessary to the performance of its legislative functions. Second, the D.C. Circuit has utilized a methodology similar to the resolution of the judicial-executive disputes over access to information, in which the court balances the need of the executive branch to maintain the confidentiality of documents against the need of Congress to obtain the information. Third, the court has been reluctant to intervene in such disputes to strike the balance itself and has instead left the resolution of such disputes to the political process. As explained in more detail below, the process of negotiation and accommodation that typically occurs when Congress demands access to confidential executive branch information does a far better job of balancing the interests of the respective branches than could a court in the context of a judicial proceeding.

C. How the Negotiation-Accommodation Process Resolves Congressional Demands for Confidential Executive Branch Information

Congress routinely obtains massive amounts of information from the executive branch on a daily basis. Most of these exchanges occur without controversy based upon either a statutory command for the production of information or in response to informal requests from congressional staffers for information from a particular executive branch agency. In the latter case, when congressional staffers informally request information from an agency, the agency has a strong incentive to respond positively in a way that satisfies the staffers' request. Because the request typically comes from a committee that has either budget or oversight responsibility for the agency, it is in the agency's interest not to alienate the congressional staff with whom they work on a regular basis.¹⁶⁹ Only if the agency officials responsible for producing the information believe that disclosure would seriously harm the ability of the agency to perform its job (such as by disclosing information revealing the pre-decisional deliberative process or information from open investigative files) will the agency decline to produce the requested information from Congress.¹⁷⁰

If the congressional staffers find their request denied by the executive branch agency, their recourse is to raise the matter with the

¹⁶⁹ See Peterson, *supra* note 111, at 626–27 (describing the process by which congressional requests of documents from the executive branch proceed).

¹⁷⁰ *Id.* at 627.

member of Congress for whom they work and have the member write directly to the agency requesting disclosure of the withheld information. At this point, Congress's interest in the information must be sufficiently great to warrant the intervention of a member and the expenditure of his or her time to obtain the documents. Once the request returns to the agency, the agency has an even greater incentive to comply with the request, since it typically has even more of an incentive not to antagonize a member of Congress than it has with respect to the staff. Therefore, the agency is unlikely to refuse the request unless there are particularly strong reasons for doing so. At that point, if the request remains unfulfilled, the member of Congress must raise the issue with the chair of the committee with investigative or oversight responsibility over the executive branch agency. Once again, unless Congress's interest is particularly compelling, it will not be worth the time and effort to pursue the information from the executive branch agency. If, however, the committee chair does pursue the matter further, the agency will refuse the request only in rare instances because, once again, it will be particularly reluctant to antagonize the chair of the committee with oversight responsibility for the agency. At this point it is likely that the matter will be discussed at the highest levels of the agency in order to determine whether the adverse impact on the agency is so significant that the agency officials are willing to provoke the ire of the committee chair.

If the congressional request remains unsatisfied, the committee's next recourse is to obtain a subpoena for production of the documents. The authority to issue a subpoena was once delegated from the full House to its committees very sparingly because the "power appears long to have been deemed too serious a matter for general delegation."¹⁷¹ Typically, Congress delegated the authority to issue subpoenas only to specific investigations.¹⁷² In the case of the congressional investigation of the Teapot Dome Scandal, for example, subpoena authority required the passage of multiple resolutions by the full Senate in order to authorize the continuation of the investigation.¹⁷³ In 1946, however, the Senate granted all of its standing committees the authority to issue subpoenas.¹⁷⁴ The House did not

¹⁷¹ EBERLING, *supra* note 23, at 34.

¹⁷² See Marshall, *supra* note 28, at 804 (noting that Congress "originally exercised its power to investigate by passing specific resolutions").

¹⁷³ *Id.*

¹⁷⁴ Legislative Reorganization Act of 1946, ch. 753, § 134(a), 60 Stat. 812, 831. This authority was later repealed after the subpoena power was incorporated into the standing rules of the Senate. See Senate Rule XXVI(1), in *STANDING ORDERS OF THE SENATE*, *supra* note 102, at 41 ("Each standing committee, including any subcommittee of any such commit-

take an analogous action until 1975,¹⁷⁵ but the House then quickly authorized subcommittees as well as full committees to issue subpoenas,¹⁷⁶ and then authorized committee chairs to issue subpoenas on their own authority.¹⁷⁷ As one commentator has noted, the delegation of subpoena authority has greatly reduced the burden on committees seeking the issuance of a subpoena to the executive branch by eliminating the need to persuade the full House of the need for an investigation which “directly affects the political costs inherent in going forward in a number of ways—all to the benefit of the Congress and to the detriment of the President.”¹⁷⁸ Because the mechanism for issuing subpoenas to the executive branch is already in place, “the decisions to confront the Executive over particular matters is done in the relative shadow of committee meetings—if not by the committee chair acting alone.”¹⁷⁹

This process of legislative-executive interaction entails the same kind of balancing of needs and interests the courts have described as the appropriate way to resolve information disputes. As the information dispute escalates, each branch must determine whether its interests are sufficiently strong to take the dispute to the next level. This process naturally filters out the vast majority of disputes between the branches and accommodates the needs and interests of each. Only when a subpoena is finally issued to the executive branch agency does the dispute engender a more ritualized and formal process.

The procedures for responding to congressional subpoenas have been governed by various presidential orders since President Nixon issued the first directive on the subject of executive privilege in 1969.¹⁸⁰ President Reagan issued a revised version of this memorandum in 1982, and this memorandum remains the principal directive to executive branch agencies concerning responses to congressional

tee, is authorized . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents . . .”).

175 H.R. Res. 988, 93d Cong. (1974).

176 H.R. Res. 5, 95th Cong. (1977). The current grant of power is recorded in House Rule XI, cl. 2(m)(1)(B), in *JEFFERSON'S MANUAL & RULES OF THE HOUSE OF REPRESENTATIVES* 563 (2009).

177 H.R. Res. 5, 95th Cong. § 25 (1977); Marshall, *supra* note 28, at 805.

178 Marshall, *supra* note 28, at 805.

179 *Id.*

180 See Memorandum from Richard Nixon, President of the United States, for the Heads of Executive Departments and Agencies on Establishing a Procedure to Govern Compliance with Congressional Demands for Information (Mar. 24, 1969), reprinted in H.R. REP. NO. 99-435, pt. 2, at 807–08 (1986).

subpoenas.¹⁸¹ The Reagan memorandum first discusses the occasional need to withhold documents in order to protect “the confidentiality of national security secrets, deliberative communications that form part of the decision-making process, or other information important to the discharge of the Executive Branch’s constitutional responsibilities.”¹⁸² According to the memorandum, “[l]egitimate and appropriate claims of privilege should not thoughtlessly be waived,” but it states that “good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege, and this tradition of accommodation should continue as the primary means of resolving conflicts between the Branches.”¹⁸³

The Reagan memorandum also sets forth a detailed set of procedures for the assertion of executive privilege in response to a congressional subpoena. First, it directs agencies to comply with congressional requests for information “as promptly and as fully as possible” unless executive officials conclude that the documents may be subject to a valid claim of executive privilege.¹⁸⁴ The memorandum requires that if the head of an agency or department concludes that disclosure raises a substantial issue of executive privilege, he must notify and consult with the Assistant Attorney General in charge of the OLC and the Counsel to the President.¹⁸⁵ The department head, the Attorney General, and the Counsel to the President must consult with one another and determine whether the subpoenaed documents should be released or whether it is possible to reach a compromise agreement with Congress in response to the subpoena.¹⁸⁶ If, however, the executive officials determine that they should withhold the documents under a claim of executive privilege, they must present the issue to the President for a final decision on whether to invoke the privilege.¹⁸⁷ The memorandum expressly states that “[t]o ensure that every reasonable accommodation is made to the needs of Congress, the executive privilege shall not be invoked without specific Presidential authorization.”¹⁸⁸

181 See Memorandum from Ronald Reagan, President of the United States, to the Heads of Executive Departments and Agencies on Procedures Governing Responses to Congressional Requests for Information (Nov. 4, 1982), *reprinted in* H.R. REP. NO. 99-435, pt. 2, at 1106-08 (1986).

182 *Id.* at 1106.

183 *Id.*

184 *Id.*

185 *Id.* at 1107.

186 *Id.*

187 *Id.*

188 *Id.* at 1106.

The Reagan memorandum thus allows for the assertion of executive privilege and the withholding of documents in response to a congressional subpoena, but it makes the assertion of the privilege difficult indeed. It requires consultation at the highest levels of the executive branch and repeated efforts at compromise with Congress. By requiring that the President himself assert the claim of privilege, it forces the President to be accountable for the decision to withhold documents from Congress and pay the political cost for such a decision. As a result, the privilege is not invoked lightly and it remains a rather rare occurrence.

During the Clinton Administration, White House Counsel Lloyd N. Cutler issued a memorandum to the heads of agencies supplementing the earlier Reagan memorandum on executive privilege.¹⁸⁹ The Cutler memorandum continues to describe the need to “protect[] the confidentiality of deliberations within the White House, including its policy councils, as well as communications between the White House and executive departments and agencies.”¹⁹⁰ It counsels, however, that “[i]n circumstances involving communications relating to investigations of personal wrongdoing by government officials, it is our practice not to assert executive privilege, either, in judicial proceedings or in congressional investigations and hearings.”¹⁹¹ The Cutler memorandum also instructs agencies to treat all White House documents in their possession as presumptively privileged and directs that “Executive Privilege belongs to the President, not individual departments or agencies.”¹⁹² Cutler’s successor as White House Counsel, Abner J. Mikva, supplemented the Cutler memorandum by clarifying that the earlier memorandum was intended to govern a subset of executive privilege claims in which agencies or departments possessed documents concerning intra-White House decisions or communications between the White House and the department or agency.¹⁹³

189 See Memorandum from Lloyd N. Cutler, Special Counsel to the President, to All Executive Department and Agency General Counsels on Congressional Requests to Departments and Agencies for Documents Protected by Executive Privilege (Sept. 28, 1994), *reprinted in* Cong. Research Serv., RL 30240, Congressional Oversight Manual app. C at 127–28.

190 *Id.* at 127.

191 *Id.*

192 *Id.*

193 See Memorandum from Abner J. Mikva, Counsel to the President, to All Executive Branch Department and Agency General Counsels on Follow-up Guidance on Responding to Congressional Requests to Departments and Agencies for Documents that May Be Subject to Executive Privilege Claims (Nov. 10, 1994).

If a President asserts a claim of executive privilege, then a number of important consequences follow. These consequences flow from an OLC opinion issued in 1984 after the controversy over the contempt of Congress citation issued to EPA Administrator Gorsuch.¹⁹⁴ This opinion (now commonly known as the “Olson Memorandum”) reached two important conclusions. First, Congress could not constitutionally direct the U.S. Attorney to proceed with a prosecution for contempt of Congress or even to refer the matter to a grand jury. The U.S. Attorney, and by implication, the Attorney General who supervises the U.S. Attorney, must retain discretion to decide whether or not to proceed with a criminal prosecution.¹⁹⁵ Second, the Olson Memorandum concluded that allowing the prosecution of an executive branch official who asserted the President’s claim of executive privilege would inhibit the President’s ability to claim privilege in appropriate cases, and that such prosecutions were constitutionally impermissible.¹⁹⁶

Building upon the Olson Memorandum, a later OLC opinion (now commonly known as the “Cooper Memorandum”)¹⁹⁷ concluded that the President’s formal assertion of executive privilege immunized an executive branch official from prosecution for contempt of Congress and concluded that U.S. Attorneys should never prosecute for contempt of Congress an executive branch official who asserts the President’s claim of executive privilege.¹⁹⁸ Thus, if the President has the political will to assert a formal claim of executive privilege, Congress effectively loses the enforcement sanction of the criminal contempt of Congress statute as a method for inducing compliance with a congressional subpoena. At that point, Congress is left with the option of using its own inherent contempt power, which the executive branch will inevitably resist,¹⁹⁹ attempting to force disclosure of the documents by increasing the political pressure on the President, or filing a civil lawsuit in order to obtain judicial enforcement of the subpoena. Congress chose the latter course when it failed to obtain documents and testimony from Joshua Bolten and Harriet Miers.

The preceding Sections have established a number of points that are essential predicates to the following discussion. First, both Con-

194 See 8 Op. O.L.C. 101 (1984) [hereinafter Olson Memorandum].

195 *Id.* at 125.

196 *Id.* at 142.

197 See 10 Op. O.L.C. 68 (1986) [hereinafter Cooper Memorandum].

198 *Id.* at 91–92.

199 Previously, the Olson Memorandum also had concluded that the use of Congress’s inherent contempt power against an executive official who asserted the President’s claim of privilege would be unconstitutional. Olson Memorandum, *supra* note 194, at 142.

gress and the President have implied constitutional powers over government information that have been frequently asserted over the past 220 years and have been recognized by the Supreme Court. Second, neither of these powers is absolute. Each branch has recognized the constitutional authority of the other, and the Supreme Court has recognized that neither power is absolute or subject to the unilateral control of one branch over the other. Finally, when these powers conflict, the dispute over access to executive branch information is typically resolved by a process of negotiation and accommodation between the branches rather than through resolution in a judicial proceeding. In the next Section, we will see how the Bush Administration attempted to thwart this process through the assertion of absolute privilege and how the district court stepped in to reject claims of absolute authority and push the parties back to the bargaining table.

D. *The Bolten and Miers Case*

The Bolten/Miers executive privilege dispute arose in the context of a congressional investigation of President Bush's decision to fire a number of U.S. Attorneys.²⁰⁰ In January 2006, D. Kyle Sampson, Chief of Staff for Attorney General Alberto Gonzales, recommended to White House Counsel Harriet Miers that the President proceed with a plan to fire a number of U.S. Attorneys based upon a list that Sampson had previously sent to the White House.²⁰¹ Sampson argued that a "limited number of U.S. [A]ttorneys could be targeted for removal

²⁰⁰ See ROSENBERG & TATELMAN, *supra* note 61, at 65–66 (noting that Congress issued and served subpoenas on two White House officials as part of its on-going efforts to seek information relating to the firing of the U.S. Attorneys); John McKay, *Train Wreck at the Justice Department: An Eye Witness Account*, 31 SEATTLE U. L. REV. 265, 265–92 (2008) (discussing the firing of the U.S. Attorneys and analyzing the issues relating to politically motivated dismissals of prosecutors); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the Bush Administration*, 24 J.L. & POL. 1, 32–35 (2008) [hereinafter Rozell & Sollenberger, *Bush Administration*] (explaining the events that led up to the executive privilege controversy); Mark J. Rozell & Mitchel A. Sollenberger, *Executive Privilege and the U.S. Attorneys Firings*, 38 PRESIDENTIAL STUD. Q. 315, 319–24 (2008) (same); David C. Weiss, Note, *Nothing Improper? Examining Constitutional Limits, Congressional Action, Partisan Motivation, and Pretextual Justification in the U.S. Attorney Removals*, 107 MICH. L. REV. 317, 322–27 (2008) (analyzing the U.S. Attorney firings and arguing for statutory reform to prevent politically motivated firings of prosecutors).

²⁰¹ David Johnston & Eric Lipton, "Loyalty" to Bush and Gonzales Was a Factor in Prosecutors Firings, *Email Shows*, N.Y. TIMES, Mar. 14, 2007, at A18. The Department of Justice requested and received resignations from the following U.S. attorneys: Daniel Bogden (D. Nev.), Paul K. Charlton (D. Ariz.), Margaret Chiara (W.D. Mich.), David E. Iglesias (D.N.M.), Carole Lam (S.D. Cal.), John McKay (W.D. Wash.), and Kevin Ryan (N.D. Cal.). Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 57 (D.D.C. 2008).

and replacement, mitigating the shock to the system that would result from an across the board firing.²⁰² Sampson added a list of candidates for removal, which was followed a month later by an email from Monica Goodling, the Deputy Director of the Executive Office for U.S. Attorneys, which attached a spreadsheet listing every U.S. Attorney and including information on political activities and whether the U.S. Attorneys were members of the conservative Federalist Society.²⁰³ After further consultations among DOJ officials, including Attorney General Gonzales and Deputy Attorney General Paul J. McNulty,²⁰⁴ on December 7, 2006, DOJ officials informed seven U.S. Attorneys that they were being removed from their positions.²⁰⁵ As the district court ruling on the House's action to enforce its subpoenas later noted,

[t]he circumstances surrounding these forced resignations aroused almost immediate suspicion. Few of the U.S. Attorneys, for instance, were given any explanation for the sudden request for their resignations. Many had no reason to suspect that their superiors were dissatisfied with their professional performance; to the contrary, most had received favorable performance reviews. Additional revelations further fueled speculation that improper criteria had motivated the dismissals.²⁰⁶

By mid-January of 2007, Congress began to express concerns about the U.S. Attorney firings and the Bush Administration's plan to replace the fired U.S. Attorneys with interim appointments that did not require Senate confirmation.²⁰⁷ In a January 18 Senate Judiciary Committee hearing, several Senators confronted the Attorney General on the U.S. Attorney firings.²⁰⁸ Gonzales acknowledged that the DOJ had requested the U.S. Attorneys' resignations but said that the firings were the result of a performance evaluation, and he asserted, "I think I would never, ever make a change in United States Attorney

202 Dan Eggen & John Solomon, *Firing Had Genesis in White House: Ex-counsel Miers First Suggested Dismissing Prosecutors Two Years Ago, Documents Show*, WASH. POST, Mar. 13, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201818_pf.html.

203 David Johnston & Eric Lipton, *Email Identified G.O.P. Candidates for Justice Jobs*, N.Y. TIMES, Apr. 14, 2007, at A1.

204 David Johnston & Eric Lipton, *Gonzales Met with Advisers on Dismissals*, N.Y. TIMES, Mar. 24, 2007, at A1.

205 Johnston & Lipton, *supra* note 201.

206 *Miers*, 558 F. Supp. 2d at 57.

207 Letter from Senators Patrick Leahy & Dianne Feinstein to Alberto Gonzales, Attorney General of the United States (Jan. 9, 2007), *cited in* Rozell & Sollenberger, *Bush Administration*, *supra* note 200, at 33 (2008).

208 *See Department of Justice Oversight: Hearings Before the S. Comm. on the Judiciary*, 110th Cong. 24 (2007) (statement of Alberto Gonzales, U.S. Att'y Gen.).

position for political reasons or if it would in any way jeopardize an ongoing serious investigation. I just would not do it.”²⁰⁹

After the initial oversight hearing the Senate opened a new hearing specifically on the subject of the U.S. Attorney firings.²¹⁰ At the hearing, Senator Charles Schumer warned, “If we do not get the documentary information that we seek, I will consider moving to subpoena that material, including performance evaluations and other documents.”²¹¹ DOJ officials, however, were evasive in their responses to Senate questioning,²¹² and Attorney General Gonzales’s later explanation that the firings were “related to policy, priorities and management”²¹³ did nothing to quell the rising suspicions that the firings were politically motivated. The Attorney General’s Chief of Staff, Kyle Sampson, resigned on March 12, 2007, after admitting that the department had not entirely disclosed the extent of White House involvement in the firings.²¹⁴ A week later President Bush admitted that the Administration’s explanation of the U.S. Attorney firings was “confusing and, in some cases, incomplete. Neither the Attorney General nor I approve of how these explanations were handled. We’re determined to correct the problem.”²¹⁵ President Bush then proposed a compromise under which certain White House documents and emails would be disclosed, but he would not permit White House officials to testify concerning the matter.²¹⁶ After DOJ officials gave conflicting accounts of the Attorney General’s involvement in the U.S. Attorney firings,²¹⁷ the House Judiciary Committee served Gonzales with the first subpoena for documents relating to the removals.²¹⁸

209 Dan Eggen, *Prosecutor Firings Not Political, Gonzales Says: Attorney General Acknowledges, Defends Actions*, WASH. POST, Jan. 19, 2007, at A2.

210 *See Preserving Prosecutorial Independence: Is the Department of Justice Politicizing the Hiring and Firing of U.S. Attorneys?: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. (2007).

211 *Id.* at 2.

212 *See id.* at 13–18 (statement of Paul J. McNulty, U.S. Deputy Att’y Gen.) (declining to answer the questions of Senator Arlen Specter directly).

213 Alberto R. Gonzales, *They Lost My Confidence*, USA TODAY, Mar. 7, 2007, at 10A.

214 Rebecca A. Carr & Ken Herman, *Gonzales, Rove Had Early Role in Firings: Emails Show High White House Interest*, ATLANTA J.-CONST., Mar. 10, 2007 at C1.

215 *Remarks on the Department of Justice and an Exchange with Reporters*, 43 WEEKLY COMP. PRES. DOC. 359 (Mar. 20, 2007).

216 *Id.* at 359–61.

217 *See* Dan Eggen & Paul Kane, *Ex-aide Contradicts Gonzales on Firings*, WASH. POST, Mar. 30, 2007, at A01 (reporting Sampson’s testimony that Gonzales was more deeply involved in the U.S. Attorney firings than he admitted, and that he and his aides sometimes made inaccurate claims in relation to the firings).

218 Dan Eggen, *House Panel Issues First Subpoena Over Firings*, WASH. POST, Apr. 11, 2007, at A01.

On June 13, 2007, the House Judiciary Committee issued subpoenas to Harriet Miers ordering her to testify and produce certain documents and to White House Chief of Staff Joshua Bolten (ordering him to produce documents).²¹⁹ Acting upon advice from the DOJ, the President asserted a claim of executive privilege in response to the subpoenas issued to the White House.²²⁰ Fred Fielding, Bush's White House Counsel, responded to the subpoenas to Miers and Bolten by advising the chairs of the House and Senate committees that "the President has decided to exert Executive Privilege and therefore the White House will not be making any production in response to these subpoenas for documents."²²¹ In addition, Mr. Fielding stated that the President had directed Miers not to produce documents or to testify before the committee.²²² Moreover, the White House refused to provide a privilege log identifying which documents were being withheld under a claim of executive privilege.²²³

On July 25, 2007, the House Judiciary Committee voted to cite both Miers and Bolten for contempt of Congress.²²⁴ Committee Chairman John Conyers stated that the purpose of the contempt vote was "not only to gain an accurate picture of the facts surrounding the U.S. [A]ttorneys controversy, but to protect our constitutional prerogatives as a co-equal branch of government."²²⁵ In response, a Justice Department official asserted that, pursuant to the existing policy at the DOJ, the U.S. Attorney for the District of Columbia would be instructed not to refer any contempt citation to the grand jury.²²⁶ Over the next six months, the two sides continued to negotiate, Congress continued to issue subpoenas, and the White House continued to assert executive privilege.²²⁷

Finally, on February 15, 2008, the full House voted to cite both Joshua Bolten and Harriet Miers for contempt of Congress.²²⁸ Attorney General Michael B. Mukasey, recently appointed to replace Gonzales who had resigned under fire for the U.S. Attorney scandal, stated that

219 Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 61 (D.D.C. 2008).

220 *Id.*

221 *Id.* at 62 (internal quotation marks omitted).

222 *Id.*

223 *Id.*

224 Neil A. Lewis, *Panel Votes to Hold Two in Contempt of Congress*, N.Y. TIMES, July 26, 2007, at A13.

225 *Id.*

226 *Id.*

227 See Rozell & Sollenberger, *Bush Administration*, *supra* note 200, at 39–40 (describing the stallmate between Congress and the White House over the inquiry into the U.S. Attorney firings).

228 Philip Shenon, *House Votes to Issue Contempt Citations*, N.Y. TIMES, Feb. 15, 2008, at A17.

“he did not expect that he would act in contravention of longstanding department precedent” against referring contempt citations to a grand jury in cases of executive privilege.²²⁹ The Attorney General responded to the contempt citation by stating that “the Department has determined that noncompliance . . . with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other actions to prosecute Mr. Bolten or Ms. Miers.”²³⁰

After the DOJ declined to prosecute the contempt citations, the House Judiciary Committee filed a civil lawsuit against Miers and Bolten to obtain judicial enforcement of the subpoenas pursuant to Resolution 980, which authorized the chair of the committee to seek declaratory and injunctive relief “affirming the duty of any individual to comply with any subpoena.”²³¹ Miers and Bolten “moved to dismiss th[e] action in its entirety on the grounds that the Committee lack[ed] standing and a proper cause of action, that disputes of this kind are non-justiciable, and that the Court should exercise its discretion to decline jurisdiction.”²³² In addition, on the merits of the action, Miers and Bolten argued that “sound principles of separation of powers and presidential autonomy dictate that the President’s closest advisors must be absolutely immune from compelled testimony before Congress, and that the Committee has no authority to demand a privilege log from the White House.”²³³ The Committee cross-moved for partial summary judgment.²³⁴ The court’s order denied the defendants’ motion and partially granted plaintiff’s motion by declaring:

Harriet Miers is not immune from compelled congressional process; she is legally required to testify pursuant to a duly issued congressional subpoena from plaintiff; and Ms. Miers may invoke executive privilege in response to specific questions as appropriate²³⁵

In addition, the court ordered that “Joshua Bolten and Ms. Miers shall produce all non-privileged documents requested by the applicable subpoenas and shall provide to plaintiff a specific description of

²²⁹ *Id.* (internal quotation marks omitted).

²³⁰ Comm. on Judiciary v. Miers, 558 F. Supp. 2d 53, 63–64 (D.D.C. 2008) (alteration in original) (internal quotation marks omitted).

²³¹ H.R. Res. 980, 110th Cong. (Feb. 13, 2008).

²³² *Miers*, 558 F. Supp. 2d at 55–56.

²³³ *Id.* at 56.

²³⁴ *Id.* at 57.

²³⁵ *Id.* at 108.

any documents withheld from production on the basis of executive privilege.”²³⁶

Although the Court ruled in favor of the House Committee, it emphasized that the scope of its ruling was quite narrow:

It is important to note that the decision today is very limited. To be sure, most of this lengthy opinion addresses, and ultimately rejects, the Executive’s several reasons why the Court should not entertain the Committee’s lawsuit, but on the merits of the Committee’s present claims the Court only resolves, and again rejects, the claim by the Executive to absolute immunity from compelled congressional process for senior presidential aides. The specific claims of executive privilege that Ms. Miers and Mr. Bolten may assert are not addressed—and the Court expresses no view on such claims. Nor should this decision discourage the process of negotiation and accommodation that most often leads to resolution of disputes between the political branches. Although standing ready to fulfill the essential judicial role to “say what the law is” on specific assertions of executive privilege that may be presented, the Court strongly encourages the political branches to resume their discourse and negotiations in an effort to resolve their differences constructively, while recognizing each branch’s essential role.²³⁷

In rejecting the various justiciability arguments presented by Miers and Bolten, the court reached a number of conclusions relevant to the issue of enforcement of congressional subpoenas. First, the court held that the case presented a “type of dispute traditionally capable of resolution before an Article III court.”²³⁸ The court thought this case to be resolvable in an Article III forum because

(1) in essence, this lawsuit merely seeks enforcement of a subpoena, which is a routine and quintessential judicial task; and (2) the Supreme Court has held that the judiciary is the final arbiter of executive privilege, and the grounds asserted for the Executive’s refusal to comply with the subpoena are ultimately rooted in executive privilege.²³⁹

Curiously, Miers and Bolten argued that the issue need not be justiciable because Congress could rely on its inherent contempt powers to imprison witnesses who fail to comply with congressional subpoenas, even though this argument was flatly inconsistent with the conclusion reached by the Olson Memorandum.²⁴⁰ Instead, the court concluded,

²³⁶ *Id.*

²³⁷ *Id.* at 56–57.

²³⁸ *Id.* at 66.

²³⁹ *Id.* at 71.

²⁴⁰ See Olson Memorandum, *supra* note 194, at 142 (concluding that Congress does not have the authority to compel prosecution of an executive branch official or even that a particular case be referred to a grand jury).

imprisoning current (and even former) senior presidential advisors and prosecuting them before the House would only exacerbate the acrimony between the two branches and would present a grave risk of precipitating a constitutional crisis. Indeed, one can easily imagine a stand-off between the Sergeant-at-Arms and executive branch law enforcement officials concerning taking Mr. Bolten into custody and detaining him. Such unseemly, provocative clashes should be avoided, and there is no need to run the risk of such mischief when a civil action can resolve the same issues in an orderly fashion [E]ven if the Committee did exercise inherent contempt, the disputed issue would in all likelihood end up before this Court, just by a different vehicle—a writ of habeas corpus brought by Ms. Miers and Mr. Bolten. In either event there would be judicial resolution of the underlying issue.²⁴¹

Finally, the court rejected the argument that it should decline to rule on the case as a matter of its equitable discretion.²⁴²

Miers and Bolten appealed the District Court decision and moved for a stay pending appeal and for expedited review. The D.C. Circuit granted the motion for a stay, but it rejected the motion for expedited review on the ground that

even if expedited, this controversy will not be fully and finally resolved by the Judicial Branch—including resolution by a panel and possible rehearing by this court en banc and by the Supreme Court—before the 110th Congress ends on January 3, 2009. At that time, the 110th House of Representatives will cease to exist as a legal entity, and the subpoenas it has issued will expire.²⁴³

On March 4, 2009, the House Committee reached an agreement with the Obama Administration and attorneys for former President George W. Bush to resolve the issues raised by the House Committee lawsuit. White House Counsel Gregory B. Craig held weeks of negotiations in order to “avert a federal court showdown that could have restricted the authority of the president in future disputes with other branches of government.”²⁴⁴ The agreement provided former presidential advisor Carl Rove and former White House Counsel Miers would testify before the House Judiciary Committee in transcribed interviews, under penalty of perjury, but not in the presence of cameras, reporters, or members of the public.²⁴⁵ Furthermore, the White House was required to produce documents concerning the U.S. Attorneys matter between the dates of 2004 and March 2007.²⁴⁶ The

²⁴¹ *Miers*, 558 F. Supp. 2d at 92 (citation omitted).

²⁴² *See id.* at 94–99 (stating that only a judicial intervention could prevent a stalemate between the other two branches of government).

²⁴³ *Comm. on the Judiciary v. Miers*, 542 F.3d 909, 911 (D.C. Cir. 2008) (per curiam).

²⁴⁴ *Johnson*, *supra* note 17.

²⁴⁵ *Id.*

²⁴⁶ *Id.*

agreement also, however, provided certain protections for particularly sensitive executive privileged material. Counsel for the witnesses were permitted to direct witnesses not to answer questions that related “to communications to or from the President.”²⁴⁷ In addition, “[four] pages of particularly sensitive privileged material (which will be described for Committee staff by a representative of the former president)” were withheld from the production to the House Committee.²⁴⁸ In addition, the agreement stated that for documents post-dating March 8, 2007, only certain documents would be provided. As to these documents, the Committee would be able only to review and not copy the documents.²⁴⁹

Lawmakers were generally happy about the agreement. House Judiciary Committee Chair John Conyers stated, “[w]e have finally broken through the Bush administration’s claims of absolute immunity This is a victory for the separation of powers and congressional oversight.”²⁵⁰ House Speaker Nancy Pelosi stated that “when there are credible allegations about the politicization of law enforcement, the need for congressional oversight is at its greatest.”²⁵¹ Other commentators suggested that the agreement was a useful compromise for both sides. Neil Eggleston, a former White House lawyer for President Bill Clinton, stated that the agreement was a “good resolution . . . that gets the House Judiciary Committee and the American public the information it needs to complete this investigation but still recognizes some interest in the White House protecting truly confidential communications.”²⁵²

Not all, however, were happy with the resolution of the lawsuit. One commentator has noted,

[a]lthough a settlement was eventually reached, the Congress that originally issued the subpoenas had ended, as had the administration that the subpoenas were intended to help Congress oversee. To the extent that enforcement of congressional subpoenas is left to the courts, future administrations now know that they can delay compliance for years.²⁵³

Given the at least temporary success of the Bush Administration in blocking access to any White House documents or testimony con-

247 Agreement Concerning Accommodation, at 1 Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008) (No. 08-0409 (JDB)), at 1, *available at* <http://judiciary.house.gov/hearings/pdf/Agreement090304.pdf>.

248 *Id.* at 2.

249 *Id.*

250 Johnson, *supra* note 17 (internal quotation marks omitted).

251 *Id.* (internal quotation marks omitted).

252 *Id.* (alteration in original) (internal quotation marks omitted).

253 Chafetz, *supra* note 18, at 1154 (footnote omitted).

cerning the U.S. Attorneys matter, it is not surprising that a number of articles have called for changes in the method by which executive privilege disputes are resolved between Congress and the executive branch. First, some critics argue that Congress should utilize its inherent contempt of Congress authority to arrest executive branch officials who refuse to comply with a congressional subpoena because the President has asserted a claim of executive privilege.²⁵⁴ Others have argued that Congress has the authority to make a final determination concerning whether the executive branch should produce documents in response to a congressional subpoena, including the right to make a final determination which must be respected by the courts that a President's claim of executive privilege is meritless.²⁵⁵ Finally, others argue that, rather than deferring to the political process, the courts should take an active role in adjudicating executive privilege disputes in the same manner as they adjudicate any other separation of powers issue.²⁵⁶ Each of these arguments will be analyzed below.

II. USING CONGRESS'S INHERENT CONTEMPT POWER TO IMPRISON OFFICIALS WHO ASSERT THE PRESIDENT'S CLAIM OF EXECUTIVE PRIVILEGE IN RESPONSE TO A CONGRESSIONAL SUBPOENA

Those who favor the use of Congress's inherent contempt power to resolve disputes over executive privilege argue that:

[T]he houses of Congress have the authority to hold executive branch officials in contempt, and that defiance of a congressional subpoena qualifies as contempt. Most notably . . . each house is properly understood as the final arbiter of disputes arising out of its contempt power—that is, when an executive branch official raises executive privilege as a defense justifying her defiance of a congressional subpoena, the house of Congress is the proper tribunal to determine whether the invocation of executive privilege was appropriate. This means that legislative-executive disputes over the contempt power should be understood to be nonjusticiable.²⁵⁷

²⁵⁴ See *id.* at 1152 (discussing the options available to Congress when executive branch officers refuse to comply with a subpoena); Zuckerman, *supra* note 18, at 44 (arguing that congressional use of its inherent powers will help “to reclaim its role in the political system”).

²⁵⁵ See Kitrosser, *supra* note 19, at 493–96 (positing that a constitutionally based executive privilege does not exist and that courts should order compliance with legitimate demands for executive branch information).

²⁵⁶ See O’Neil, *supra* note 20, at 1083 (arguing that disputes over claims of executive privilege are no different than “conventional” information disputes and courts should “play some substantive role” in resolving these disputes).

²⁵⁷ Chafetz, *supra* note 18, at 1085–86.

Another commentator suggests that Congress could utilize its inherent contempt power by delegating the contempt power “to a specialized internal body that would adjudicate contempt citations and forward its findings and recommendations to the full chamber for final disposition.”²⁵⁸

As a preliminary matter, it is worth noting that Congress’s use of its inherent contempt power does not seem to be a very practical or effective way for Congress to enforce its institutional prerogatives. Proponents of this authority suggest that “each house has a sergeant-at-arms, and the Capitol building has its own jail. The sergeant can be sent to arrest contemnors and, if necessary, hold them in his custody until either their contempt is purged or the congressional session ends.”²⁵⁹ The use of such power in an executive privilege dispute, however, presents the improbable image of the Sergeant-at-Arms knocking at the White House gate and asking to be admitted so he can arrest the President’s chief of staff. Obviously, if the President has ordered his chief of staff to assert executive privilege, he is not going to permit a congressional Sergeant-at-Arms to arrest the Chief of Staff, and the President has more than enough force to insure that no such arrest is made. This point is significant not just because the President can easily foil any attempt to arrest an executive branch official, but also because the stand-off suggests why Congress’s unilateral assertion of its own authority is inconsistent with the separation of powers. Each branch has a constitutionally based prerogative, and each branch has the right to assert its constitutionally based claim against the other. Congress no more has the unilateral right to arrest an executive official for asserting the president’s constitutionally based claim of executive privilege than the President has the unilateral right to send the Secret Service or FBI to arrest a member of Congress for issuing a subpoena for constitutionally protected executive branch information.

The suggestion that Congress use its contempt power to arrest an official who asserts executive privilege is not only impractical, but also rests on uncertain grounds. Commentators have justified Congress’s unilateral use of its inherent power against executive privilege on several grounds, including English and American history which shows that “the houses of Congress have the authority to hold executive branch officials in contempt,”²⁶⁰ and that the ability to enforce its

258 Zuckerman, *supra* note 18, at 75.

259 Chafetz, *supra* note 18, at 1152.

260 *Id.* at 1085.

subpoena power through inherent contempt of Congress proceedings is necessary to remedy “the Executive’s refusal to prosecute [which] may result in unremedied obstruction to the legislative process, making a ‘mockery’ of the legislative power.”²⁶¹ As will be shown below, however, there is no relevant history supporting Congress’s unilateral right to arrest an executive branch official for asserting the President’s claim of executive privilege. Nor is it necessary for Congress to assert such a unilateral authority in order to protect its own constitutional prerogatives.

A. *The History of Congress’s Contempt Power*

Before discussing the specific historical precedents that are claimed to support Congress’s authority to imprison executive branch officials who assert the president’s claim of executive privilege, it is important first to understand precisely what kind of evidence would support such a claim. It is not enough simply to show that Parliament, state legislatures, or the Congress have resisted executive branch encroachments on their authority. Obviously, there is a long history of conflicts between the legislative and executive power over a wide range of subjects, not just access to executive branch documents and testimony. The fact that legislatures have protested against executive branch encroachments and have argued in favor of their constitutional authority does not establish a precedent for the use of force and imprisonment against the executive branch in such disputes. Similarly, the use by Congress of the political weapons at its disposal, including refusing to appropriate funds needed by the executive branch, refusing to confirm nominees to executive branch positions, or passing legislation that permissibly limits the powers of the executive branch, does not establish a precedent for Congress’s unilateral use of its power to arrest and imprison executive branch officials. Indeed, the political weapons available to Congress are among the many reasons why Congress does not need the authority to arrest executive branch officials in order to enforce its legitimate constitutional prerogatives.²⁶²

²⁶¹ Zuckerman, *supra* note 18, at 63 (citations omitted); *see also* Chafetz, *supra* note 18, at 1145 (“[I]n order for this oversight power to be effective in rooting out executive branch malevolence and incompetence, Congress must have access to precisely that information that the executive does not wish to turn over—that is, it must have the power to hold executive branch officials in contempt.”).

²⁶² *See infra* Part II.B.

Finally, the mere assertion by legislatures of authority to imprison executive branch officials for asserting a claim of executive privilege would not be enough to establish a significant constitutional precedent if the executive branch has resisted such an assertion of power and failed to acquiesce in Congress's assertion of it. As Eric Posner and Adrian Vermeule have cogently argued, such "constitutional showdowns" between the political branches have precedential significance with respect to the relative constitutional powers of the branches only when a dispute "ends in the total or partial acquiescence by one branch in the views of the other"²⁶³ With that in mind, we now turn to an analysis of the precedents cited in support of Congress's use of inherent contempt power against officials who assert the President's claim of executive privilege.

1. English Parliamentary Precedents

As a preliminary matter, one might doubt the relevance of any precedents from English parliamentary practice. An assertion of authority by the English Parliament against the unelected and politically unaccountable authority of the English monarchy would not necessarily be relevant to a dispute between the two politically accountable branches of the federal government, each of which has an acknowledged constitutional prerogative. Moreover, as the Supreme Court stated in the context of a case involving the scope of Congress's inherent contempt power:

[T]he possession by Congress of the commingled legislative-judicial authority as to contempts which was exerted in the House of Commons would be absolutely destructive of the distinction between legislative, executive, and judicial authority which is interwoven in the very fabric of the Constitution and would disregard express limitations therein, it must follow that there is no ground whatever for assuming that any implication as to such a power may be deduced from any grant of authority made to Congress by the Constitution.²⁶⁴

Even if one were to accept, however, that parliamentary practice is relevant to the issue at hand, there is no precedent for the arrest of an executive official for withholding documents that are arguably protected by any form of executive privilege. The first significant example cited by Professor Chafetz involved the arrest of George Ferrers, a member of Parliament, pursuant to an action in the King's

²⁶³ Eric A. Posner & Adrian Vermeule, *Constitutional Showdowns*, 156 U. PA. L. REV. 991, 997 (2008).

²⁶⁴ *Marshall v. Gordon*, 243 U.S. 521, 536 (1917).

Bench to recover a debt.²⁶⁵ The House of Commons sent its sergeant to obtain Ferrers' release, but the jailers resisted the sergeant and were aided by the arrival of London's sheriffs.²⁶⁶ The Parliament later arrested the jailers as well as the person who initiated the suit against Ferrers and imprisoned them for contempt.²⁶⁷ After the Parliament released the prisoners, King Henry VIII commended their action because Ferrers was the King's servant as well, which by itself would have privileged him against arrest.²⁶⁸ Professor Chafetz argues that "[b]y punishing these contempts itself, the House asserted an institutional identity independent from the Crown: contempts were no longer interferences with the functioning of royal governance; rather, they were interferences with the House's ability to do its own business."²⁶⁹ Thus, Professor Chafetz argues, "it became conceivable to hold Crown officers—indeed, even monarchs themselves—in contempt."²⁷⁰ Although this incident marks an interesting chapter in the Parliament's struggle to assert an independent identity from the Crown, and has some relevance to the history of our own Constitution's limited protections against the arrest of legislators,²⁷¹ it hardly amounts to a precedent for the unilateral use of force against an official who asserts the president's claim of executive privilege.

Other examples cited by Professor Chafetz do not involve contempt of Parliament at all but simply Parliament's resistance to an effort by the Crown to breach or limit some parliamentary prerogative.²⁷² These clashes between the King and Parliament were certainly important to the establishment of Parliament as an independent branch of government, but they hardly support the claim that Congress may imprison an official who asserts the President's claim of privilege. It seems a little far-fetched to claim that "the English Civil War can well be thought of as the victory of parliamentary privilege over such claims of royal prerogative—indeed, as the ultimate finding of contempt of Parliament."²⁷³ The mere fact that Parliament claimed

265 Chafetz, *supra* note 18, at 1095.

266 *Id.*

267 *Id.* at 1096–97.

268 *Id.*

269 *Id.* at 1097.

270 *Id.*

271 See U.S. CONST. art. I, § 6, cl. 1 ("They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

272 Chafetz, *supra* note 18, at 1099–1100 (discussing conflicts between the Crown and Parliament under Queen Elizabeth I and King James I).

273 *Id.* at 1101.

the right to question the King and the King's officials, and that it resisted the King's effort to attack its own privileges and powers, offers nothing of relevance to the modern day executive privilege dispute. These battles between Parliament and the King over issues such as the power to tax and the appropriations authority²⁷⁴ provide an interesting backdrop to the division of power between the executive and legislative branches in our own Constitution, but they say absolutely nothing about Congress's power to imprison an official for asserting the claim of executive privilege. In fact, even in the very different context of English parliamentary history, Professor Chafetz cannot find a single example of Parliament imprisoning an official for asserting a claim anything like the President's claim of executive privilege. It simply overreaches for Professor Chafetz to argue that "[w]ith these [parliamentary] precedents in mind, and with no available evidence to the contrary, it seems reasonable to assume that the Founders understood Congress to have the authority to hold executive branch officers in contempt."²⁷⁵

2. *Legislative Contempt in Pre-Constitutional America*

Professor Chafetz also argues that precedent for the use of contempt of Congress against officials asserting executive privilege may be found in the practices of legislatures in America prior to the ratification of the Constitution. According to Professor Chafetz, the "colonial assemblies were actually quite willing to use their contempt powers against Crown officials."²⁷⁶ The examples cited by Professor Chafetz, however, such as arresting a provost marshal for ignoring a legislative order, arresting a council clerk for insolence, arresting the public printer for printing a resolution the legislature found offensive, arresting the receiver of powder money for refusing to submit his accounts to the legislature, and arresting a military officer who continued to exercise the functions of his office after his removal²⁷⁷ do not remotely establish a precedent for Congress's use of contempt in an executive privilege dispute. Neither the President nor the DOJ has ever questioned the existence of Congress's contempt power, nor have they claimed that all executive officials are immune from con-

²⁷⁴ See *id.* at 1108–09 (discussing Parliament's resistance to a tax levied by King Charles I in 1628).

²⁷⁵ *Id.* at 1145.

²⁷⁶ *Id.* at 1121.

²⁷⁷ *Id.* (referring to actions taken by the colonial governments of Massachusetts, North and South Carolina, and Virginia).

tempt of Congress, regardless of the cause or provocation. The executive branch's claim has been far more limited: that immunity attaches only to an official who asserts the President's claim of executive privilege.²⁷⁸ None of the examples cited by Professor Chafetz involved such a claim.

Of course, colonial legislatures disputed efforts by royal governors to interfere with their prerogatives, just as Congress protests the President's efforts to interfere with its prerogatives, but there is no pre-constitutional precedent that is relevant to the current dispute. Examples involving the use of the legislatures' appropriations power²⁷⁹ simply reinforce the argument that Congress has sufficient weapons to enforce its investigative demands without resorting to arrest of executive officials.

3. *Contempt of Congress and Executive Privilege under the United States Constitution*

Professor Chafetz particularly seems to overreach when he asserts that Congress has used its contempt power against executive officers, including a number of presidents.²⁸⁰ The first precedent cited by Professor Chafetz involved President Jackson's removal of federal money from the Second Bank of the United States and the deposit of the money into state banks.²⁸¹ The Senate adopted a resolution that protested that the President had assumed a power not belonging to him.²⁸² After Jackson replied in turn, the Senate passed a series of resolutions asserting that the President had overstepped his constitutional authority and usurped powers belonging to Congress, that he had no right to make formal protests against votes or proceedings in the House of Congress, and that his protest constituted a "breach of

278 See Cooper Memorandum, *supra* note 197, at 68 ("Congress may not, as a matter of statutory or constitutional law, invoke the criminal contempt of Congress procedure against the head of an Executive agency acting on the President's instructions to assert executive privilege in response to a congressional subpoena."); Olson Memorandum, *supra* note 194, at 101 ("[A] United States Attorney is not required to refer a congressional contempt citation to a grand jury or otherwise to prosecute an Executive Branch official who carries out the President's instruction to invoke the President's claim of executive privilege before a committee of Congress.").

279 See Chafetz, *supra* note 18, at 1122–23 (discussing how the Massachusetts Assembly lowered and delayed paying the salaries of its governor and lieutenant governor in 1720 and how in 1734 South Carolina's House of Commons withheld the salary of the colony's chief justice).

280 See *id.* at 1132–43 (purporting to discuss contempt proceedings against executive branch officers).

281 *Id.* at 1133.

282 *Id.*

the privileges of the Senate.”²⁸³ This example does not even involve the use of Congress’s contempt power at all; it is simply a garden variety separation of powers dispute between Congress and the President, where each side argues for the supremacy of its own constitutional prerogatives. It cannot remotely be considered precedent for the use of Congress’s contempt power in an executive privilege dispute.

Professor Chafetz next discusses a dispute between the House and President John Tyler over the contents of one of the President’s veto messages.²⁸⁴ After a congressional report recommended a constitutional amendment that would permit Congress to override a presidential veto by a simple majority, President Tyler protested that the House’s report made serious charges against him without him having the chance to reply.²⁸⁵ According to Professor Chafetz, the “House then resolved that the [P]resident had no right to make a protest against its votes or proceedings, and that the [President’s] protest message constituted a breach of the privileges of this House.”²⁸⁶ Again, this example is simply a run-of-the-mill power struggle between the President and Congress over the extent of their respective constitutional prerogatives. It did not even involve a hint of the use of Congress’s contempt power to imprison any member of the executive branch. It is, like countless separation of powers disputes in the country’s history, simply a battle of words between the President and Congress.

The next example involved a dispute in 1866 between James Fry, the Provost Marshal General of the Army, and Representative Roscoe Conkling.²⁸⁷ After Representative Conkling had referred to Fry as “an undeserving public servant” who had “turned the business of recruiting and drafting into one carnival of corrupt disorder, into a paradise of coxcombs and thieves,”²⁸⁸ Fry wrote that Conkling’s animosity “arose altogether from my unwillingness to gratify him in certain matters in which he had a strong personal interest. It is true, also, that he was foiled in efforts to obtain undue concessions from my bureau, and to discredit me in the eyes of my superiors.”²⁸⁹ The dispute was

283 *Id.* (citations omitted) (internal quotation marks omitted) (discussing Congress’s response to President Jackson’s assertion that “the only constitutional checks on the presidency were impeachment, criminal trial, civil suit, and public opinion”).

284 *See id.* at 1133–34.

285 *Id.* at 1134.

286 *Id.* (alteration in original) (citations omitted) (internal quotation marks omitted).

287 *Id.* at 1134–35.

288 CONG. GLOBE, 39th Cong., 1st Sess. 2151 (1866).

289 *Id.* at 2293.

referred to a House Committee, which reported two resolutions that were adopted by the House. The first asserted that Fry's allegations against Conkling were "wholly without foundation in truth."²⁹⁰ The second resolution stated:

General Fry, an officer of the Government of the United States, and head of one of its military bureaus, in writing and publishing these accusations . . . and which, owing to the crimes and wrongs which they impute to a Member of this body, are of a nature deeply injurious to the official and personal character, influence, and privileges of such Member, and their publication originating, as in the judgment of the House they did, in no misapprehension of facts, but in the resentment and passion of their author, was guilty of a gross violation of the privileges of such Member and of this House, and his conduct in that regard merits and receives its unqualified disapprobation.²⁹¹

Professor Chafetz then notes that Congress abolished the Provost Marshal General's Bureau by statute the following month.²⁹² But the incident did not involve any assertion of presidential prerogative or privilege, did not result in a citation for contempt of Congress, and did not contain any suggestion that Congress would have the power to imprison an officer for contempt.

There have been two instances in which Congress actually did imprison an executive branch official for contempt of Congress. These examples, which Professor Chafetz claims "have been generally neglected by both judicial and academic commentators,"²⁹³ are the only instances in over 215 years of conflicts between the President and Congress in which Congress utilized its inherent contempt power to arrest an executive branch official. Neither case, however, involved an assertion of executive privilege by the official; in fact, neither case involved a separation of powers dispute at all.

The first incident involved a subpoena to George F. Seward (a nephew of Secretary of State William H. Seward), who was then Minister to China.²⁹⁴ The House Committee on Expenditures in the State Department commenced an investigation of Seward because it received evidence that he had misappropriated money received by the Shanghai Consulate.²⁹⁵ Seward's counsel refused the committee's demands for Seward's books or his testimony on the ground that it violated

290 3 HINDS, *supra* note 59, § 2687, at 1134.

291 *Id.*; see also Chafetz, *supra* note 18, at 1135 (quoting the same resolution).

292 Chafetz, *supra* note 18, at 1135.

293 *Id.* at 1085.

294 *Id.* at 1136.

295 *Id.* at 1135–36 (arising from an affidavit by Seward's successor in Shanghai alleging that books and records would show Seward's misappropriation of funds).

Seward's right against compelled self-incrimination.²⁹⁶ In response, the House adopted a contempt of Congress resolution, and Seward appeared before the full House, which voted to commit his reply to the Judiciary Committee and released him on his own recognizance.²⁹⁷ Although the committee that issued the original subpoena to Seward reported articles of impeachment,²⁹⁸ the House never voted on these articles.²⁹⁹ The Judiciary Committee issued a report that Seward "should not be compelled to incriminate himself" during ongoing impeachment proceedings.³⁰⁰ Although this incident involves the issuance of a contempt citation against an executive branch official, it lacks an essential element necessary to be a relevant precedent for the issue at hand: the assertion by the executive official of the President's claim of executive privilege. Indeed, the only defense offered by Seward was his personal Fifth Amendment privilege, and the dispute did not involve any separation of powers concerns. The Olson Memorandum's rationale for immunity from contempt is that it would impermissibly burden the President's ability to assert executive privilege.³⁰¹ Because this incident does not involve the assertion of any presidential prerogative, it cannot serve as a precedent for Congress's power to use its contempt authority in an executive privilege dispute.

The last example cited by Professor Chafetz took place in 1916 when the House cited H. Snowden Marshall, the United States Attorney for the Southern District of New York, for contempt of Congress.³⁰² The dispute began in December of 1915 when Representative Frank Buchanan accused Marshall of high crimes and misdemeanors.³⁰³ Two weeks later, a federal grand jury in the Southern District of New York indicted Buchanan for violations of the

296 *Id.* at 1136 (noting that this occurred after Seward's counsel was unsuccessful in arguing that the committee lacked the authority to compel production of the books and records).

297 *Id.* at 1136-37 (appearing before the full House, Seward "presented a written statement contending that the committee's investigation was leading to impeachment charges"); see also 8 CONG. REC. H2138-44 (1879) (recording Seward's appearance and the House's referral to the Committee on the Judiciary).

298 8 CONG. REC. H2350-51 (1879).

299 Chafetz, *supra* note 18, at 1137.

300 *Id.*

301 See Olson Memorandum, *supra* note 194, at 102 ("If one House of Congress could make it a crime simply to assert the President's presumptively valid claim, even if a court subsequently were to agree that the privilege claim were valid, the exercise of the privilege would be so burdened as to be nullified.").

302 Chafetz, *supra* note 18, at 1137.

303 *Id.*

Sherman Antitrust Act.³⁰⁴ Buchanan then succeeded in establishing a committee to investigate alleged misconduct by Marshall.³⁰⁵ In the midst of the investigation, Marshall wrote a letter to the investigating committee acknowledging that he had been the source for an article accusing the committee of interfering with the antitrust investigation and charging the committee with conduct that the Supreme Court later described as “certainly unparliamentary and manifestly ill-tempered[,] and which was well calculated to arouse the indignation not only of the members of the subcommittee[,] but of those of the House generally.”³⁰⁶ In response, the House adopted a contempt of Congress resolution and ordered the Sergeant-at-Arms to arrest Marshall.³⁰⁷ The Supreme Court granted Marshall’s petition for habeas corpus and ordered him released from custody on the ground that:

[T]he contempt was deemed to result from the writing of the letter not because of any obstruction to the performance of legislative duty resulting from the letter or because the preservation of the power of the House to carry out its legislative authority was endangered by its writing, but because of the effect and operation which the irritating and ill-tempered statements made in the letter would produce upon the public mind or because of the sense of indignation which it may be assumed was produced by the letter upon the members of the committee and of the House generally. But to state this situation is to demonstrate that the contempt relied upon was not intrinsic to the right of the House to preserve the means of discharging its legislative duties, but was extrinsic to the discharge of such duties and related only to the presumed operation which the letter might have upon the public mind and the indignation naturally felt by members of the committee on the subject. But these considerations plainly serve to mark the broad boundary line which separates the limited implied power to deal with classes of acts as contempts for self-preservation and the comprehensive legislative power to provide by law for punishment for wrongful acts.³⁰⁸

On the basis of this decision, Professor Chafetz argues that “[n]either the House nor the Court seemed to have any doubt that the House could arrest and hold a federal prosecutor for actions which were truly within the scope of Congress’s contempt power,

³⁰⁴ See *United States ex rel. Marshall v. Gordon*, 235 F. 422, 425 (S.D.N.Y. 1916) (denying Marshall’s writ of habeas corpus and discussing Buchanan’s indictments), *rev’d*, 243 U.S. 521 (1917); Chafetz, *supra* note 18, at 1137.

³⁰⁵ *Marshall*, 235 F. at 425 (discussing how a resolution by Buchanan resulted in the convening of a special committee to act on behalf of the Judiciary Committee in the matter); Chafetz, *supra* note 18, at 1137.

³⁰⁶ *Marshall*, 243 U.S. at 531–32.

³⁰⁷ *Id.* at 532.

³⁰⁸ *Id.* at 545–46.

rightly construed.”³⁰⁹ Even if this statement were true (and it seems a stretch to reach that far based on the Supreme Court’s complete silence on the issue), this case, like the previous one, not only does not involve a claim of executive privilege, it does not involve a separation of powers dispute between Congress and the executive branch. Indeed, this case does not even involve a congressional subpoena for documents or testimony. Moreover, this case has hardly been, as Professor Chafetz suggests, largely ignored by the commentators.³¹⁰ The only reason that it has not been discussed at greater length is because the absence of any claim of executive privilege, and, indeed, the absence of an assertion of any executive branch prerogative, makes the case inapposite to the use of contempt in an executive privilege dispute.

4. *The Absence of Contempt of Congress from the Long History of Executive Privilege Disputes Between Congress and the President*

The most significant constitutional precedents on the issue whether Congress may use its inherent contempt power in response to a claim of executive privilege are like Sir Arthur Conan Doyle’s famously non-barking dog;³¹¹ they involve the absence of what would be expected if Congress believed it had such power. In the long history of executive privilege disputes between Congress and the President, dating back to the last decade of the eighteenth century, Congress has never used its inherent contempt power in response to a President’s claim of executive privilege.

The history of the President’s assertion of what is now known as executive privilege³¹² to prevent disclosure of documents to Congress is even older than the legislature’s use of contempt of Congress to enforce its prerogatives. The most famous early assertion of the privilege occurred in 1792 when a committee of the House of Representatives investigating the failure of General St. Clair’s expedition against the Indians requested President Washington to produce all papers

³⁰⁹ Chafetz, *supra* note 18, at 1139.

³¹⁰ See Peterson, *supra* note 111, at 570–71 n.41 (“Congress once used its inherent civil contempt power to imprison an executive branch official when, in 1917, the district attorney for the Southern District of New York wrote an allegedly ‘defamatory and insulting’ letter to Congress. This case, however, involved no claim of executive privilege.” (quoting *Marshall*, 243 U.S. at 532) (citation omitted)).

³¹¹ See SIR ARTHUR CONAN DOYLE, *Silver Blaze*, in *THE ADVENTURES AND THE MEMOIRS OF SHERLOCK HOLMES* 309, 330 (2004).

³¹² The term executive privilege was not used to describe these claims until the 1950s. See Rozell, *supra* note 2, at 403 (“[The] phrase was not a part of the common language until President Eisenhower’s administration . . .”).

relating to the St. Clair expedition. Thomas Jefferson described the consensus of the first cabinet as follows:

We had all considered, and were of one mind, first, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public: consequently were to exercise a discretion. Fourth, that neither the committee nor House had a right to call on the Head of a Department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President.³¹³

President Washington asked Jefferson to seek a compromise with Congress that would preserve the executive's prerogative, while assuring congressional access to important documents. Ultimately, Jefferson persuaded the House to request the President to "cause the proper officers to lay before this House such papers of a public nature, in the Executive Department, as may be necessary to the investigation of the causes of the failure of the late expedition under Major General St. Clair."³¹⁴ One scholar writing about the St. Clair dispute stated that "[t]his beginning of the executive privilege indicates . . . the [P]resident could refuse documents because of their secret nature, a category insisted upon by subsequent presidents ever since."³¹⁵ Although views differ on the extent to which this dispute represents a clear victory for the assertion of executive privilege,³¹⁶ the incident shows that during the first decade of the Constitution, the executive and legislative branches each asserted constitutional prerogatives relating to disclosure of executive branch documents and that the dispute was resolved by a negotiated agreement and not by even the threat of contempt of Congress.

Similarly, in 1794, the Senate directed Secretary of State Edmund Randolph "to lay before the Senate the correspondences which have been had between the Minister of the United States at the Republic of France and said Republic, and between said Minister and the office

³¹³ 1 THE WRITINGS OF THOMAS JEFFERSON 303–04 (Andrew A. Lipscomb & Albert Ellery Bergh eds., 1903).

³¹⁴ 3 ANNALS OF CONG. 536 (1792).

³¹⁵ ADAM CARLYLE BRECKENRIDGE, THE EXECUTIVE PRIVILEGE 31 (1974).

³¹⁶ Compare 6 Op. O.L.C. 751, 752 (1982) ("Although the Cabinet 'agreed in this case, that there was not a paper which might not be properly produced,' the President apparently felt it advisable nevertheless to negotiate with Congress a non-confrontational resolution of the problem. Jefferson thereupon agreed to speak individually to members of the House committee . . . [And his] conciliation efforts were successful."), with BERGER, EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH, *supra* note 114, at 167–72 ("It is another mark of slipshod advocacy that this incident should be cited for a 'refusal' of information.").

of the Secretary of State.”³¹⁷ Attorney General William Bradford wrote to the President that “it is the duty of the Executive to withhold such parts of the said correspondence as in the judgment of the Executive shall be deemed unsafe and improper to be disclosed.”³¹⁸ Ultimately, President Washington responded to the Senate request by stating:

After an examination of . . . [the correspondence], I directed copies and translations to be made, except in those particulars which, in my judgment, for public considerations, ought not to be communicated.

These copies and translations are now transmitted to the Senate, but the nature of them manifests the propriety of their being received as confidential.³¹⁹

This pattern of negotiated compromise continued throughout the nineteenth century. On a number of occasions, Congress expressly authorized the President to exclude material that he deemed necessary to keep private. For example, in 1807 the House investigated the Burr conspiracy and requested the President to:

[L]ay before this House any information in possession of the Executive, except such as he may deem the public welfare to require not to be disclosed, touching any illegal combination of private individuals against the peace and safety of the Union, or any military expedition planned by such individuals against the territories of any Power in amity with the United States; together with the measures which the Executive has pursued and proposes to take for suppressing or defeating the same.³²⁰

In 1825, the House requested James Monroe to disclose information about the alleged misconduct of certain naval officers to the extent that he deemed the disclosure not to be incompatible with the public interest.³²¹ Monroe responded that “a communication at this time of those documents would not comport with the public interest nor with what is due to the parties concerned.”³²² In 1861, Congress requested President Lincoln to produce certain dispatches from Fort Sumter, “if in his opinion not incompatible with the public interest”³²³ One can argue about the extent to which these incidents revealed con-

³¹⁷ 4 ANNALS OF CONG. 38 (1794).

³¹⁸ 4 THE WORKS OF ALEXANDER HAMILTON 494–95 (John C. Hamilton ed., New York, Charles S. Francis & Co. 1850).

³¹⁹ Letter from George Washington, President of the United States, to the United States Senate (Feb. 26, 1794), in 1 AMERICAN STATE PAPERS: FOREIGN RELATIONS 329 (Walter Lowrie & Matthew St. Clair Clarke eds., 1833) (notations omitted).

³²⁰ 16 ANNALS OF CONG. 336 (1807).

³²¹ H. JOURNAL, 18th Cong., 2d Sess. 102–03 (1825).

³²² 2 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789–1897, at 278 (James D. Richardson ed., Washington, Government Printing Office 1896).

³²³ CONG. GLOBE, 36th Cong., 2d Sess. 1498 (1861).

gressional deference to executive privilege,³²⁴ but they certainly demonstrate negotiation and accommodation and not the unilateral assertion of congressional hegemony.

On other occasions, the President was more accommodating to Congress. For example, in 1835, President Andrew Jackson refused to disclose to the Senate certain documents relating to the negotiation of a boundary dispute with Canada.³²⁵ During the next session of Congress, however, the President disclosed the requested documents to the Senate and stated that “as the negotiation was undertaken under the special advice of the Senate, I deem it improper to withhold the information which that body has requested, submitting to them to decide whether it will be expedient to publish the correspondence before the negotiation has been closed.”³²⁶

During the nineteenth century, there were numerous instances in which Presidents refused to supply information or documents to Congress on the ground that disclosure would encroach on subjects exclusively belonging to the executive or otherwise detrimental to the operation of the government.³²⁷ President John Tyler refused to disclose to the House of Representatives information relating to ongoing negotiations to settle Native-American claims against the United States government, and he expressly inserted his constitutional authority to withhold such documents:

The injunction of the Constitution that the President “shall take care that the laws be faithfully executed” necessarily confers an authority commensurate with the obligation imposed to inquire into the manner in which all public agents perform the duties assigned to them by law. To be effective these inquiries must often be confidential. They may result in the collection of truth or of falsehood, or they may be incomplete and may require further prosecution. To maintain that the President can exercise no discretion as to the time in which the matters thus collected shall be

³²⁴ Archibald Cox argued that these situations must be stricken from any list of historical precedents for Executive privilege because “there was no need for a claim of constitutional right because there was no resistance to a congressional demand.” Cox, *supra* note 114, at 1397. The Office of Legal Counsel disagreed, arguing that “[o]ne could just as well read the exception clause, however, as an early illustration of congressional recognition of the executive privilege.” 6 Op. O.L.C. 751, 755 n.15 (1982).

³²⁵ 3 COMPILATION, *supra* note 322, at 127 (“In answer to a resolution of the House of Representatives . . . I have to acquaint the House that the negotiation for the settlement of the northeastern boundary being now in progress, it would, in my opinion, be incompatible with the public interest to lay before the House any communications which have been had between the two Governments since the period alluded to in the resolution.”).

³²⁶ *Id.* at 230.

³²⁷ See ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY, *supra* note 114, at 36–37 (discussing examples from Presidents Fillmore, Grant, Lincoln, and Polk).

promulgated . . . would deprive him at once of the means of performing one of the most salutary duties of his office To require from the Executive the transfer of this discretion to a coordinate branch of the Government is equivalent to the denial of its possession by him and would render him dependent upon that branch in the performance of a duty purely executive.³²⁸

Even when Congress vigorously asserted its right to obtain executive branch documents and disputed the President's claim of privilege, it never asserted that it had the right to imprison for contempt the executive branch official responsible for withholding the documents. During the administration of President Tyler, for example, the House of Representatives asserted the power to compel the production of documents from the executive branch.³²⁹ Members of the House argued that the President did not have the right to withhold documents based on the assertion of executive privilege, but they claimed only the ultimate sanction of impeachment and never argued that the House had the right to arrest an executive branch official for contempt of Congress.³³⁰ During the Polk Administration, the President claimed a privilege not to produce certain military and diplomatic communications with Mexico after Congress had subpoenaed the documents.³³¹ After President Polk's claim of privilege, the House debated whether to continue to pursue access to the documents.³³² A number of representatives agreed with Representative Adams, who asserted that

this House ought to sustain, in the strongest manner, their right to call for information upon questions in which war and peace are concerned. They ought to maintain their right, and maintain it in a very distinct manner, against this assertion on the part of the President of the United States.³³³

³²⁸ 5 COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1916, at 2075 (James D. Richardson ed., Washington, Gov't Printing Office 1897).

³²⁹ See 3 HINDS, *supra* note 59, § 1885, at 181 (adopting a resolution asking the President to give the House "the several reports lately made to the Department of War by Lieutenant-Colonel Hitchcock relative to the affairs of the Cherokee Indians, together with all information communicated by him concerning the frauds he was charged to investigate; also all facts in possession of the Executive from any source relating to the subject").

³³⁰ See *id.* at 182-85 ("The House of Representatives has the sole power of impeachment. The President himself, in the discharge of his most independent functions, is subject to the exercise of this power—a power which implies the right of inquiry on the part of the House to the fullest and most unlimited extent.").

³³¹ CONG. GLOBE, 30th Cong., 1st Sess. 166 (1848).

³³² *Id.* at 166-70.

³³³ *Id.* at 167 (statement of Rep. Adams).

Other representatives argued that the President rightfully withheld the documents under a claim of privilege.³³⁴ Nowhere in this extended debate, however, did any member of Congress assert that the House had the authority to arrest an executive official for withholding the documents in response to the House subpoena. The only remedy they recognized was the power to impeach the President.³³⁵ For example, Representative Ingersoll stated: “And who in such cases was to be the judge of the propriety of making the communications? The President was the judge. And if the President exercised his discretion improperly, what remedy had this House? This House had the power to impeach him, and that was all it could do.”³³⁶

In an interesting precursor to the U.S. Attorneys dispute at the end of the George W. Bush Administration, in 1886, President Grover Cleveland adopted the opinion of his Attorney General that documents concerning the firing of a United States District Attorney should not be disclosed to the Senate and declined to produce the subpoenaed documents.³³⁷ Twenty-three years after the ensuing Senate debate, one Senator called it “[t]he most remarkable discussion which was ever had upon this question [of the President’s right to withhold documents from Congress].”³³⁸ In the midst of the contentious debate, even those senators who argued that the Senate had a right to obtain the documents acknowledged that if the President ordered them not to be produced, “there is no remedy,”³³⁹ and that their only option was the ultimate sanction of impeachment.³⁴⁰

During the twentieth century, presidents continued to assert a constitutional right not to disclose documents to Congress.³⁴¹ Presi-

334 *Id.* (statement of Rep. Holmes) (arguing that if President Polk “had revealed to this House, when there was a war between the two nations, all the correspondence, which was secret in its very nature . . . he would have withdrawn from himself, and the country, perhaps, one of the surest means of restoring peace, by means of private persons”).

335 *Id.* at 169.

336 *Id.* at 169 (statement of Rep. Ingersoll).

337 See EDWARD S. CORWIN ET AL., *THE PRESIDENT: OFFICE AND POWERS 1787–1984*, at 429, 475 (5th ed. 1984).

338 43 CONG. REC. 841 (1909) (statement of Sen. Bacon).

339 17 CONG. REC. 2,800 (1886) (statement of Sen. Logan).

340 See 17 CONG. REC. 2,806–07 (1886) (statement of Sen. Van Wyke) (recognizing that impeachment is not proposed, but questioning what must be done in light of the President’s refusal to disclose information); 17 CONG. REC. 2,737 (1886) (statement of Rep. Voorhees) (arguing that when an executive official “is guilty of a violation of his official duty and of a subversion of the fundamental principles of the Government . . . I know no other proceeding provided by the Constitution in such a case than impeachment”).

341 See ROZELL, *EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY*, *supra* note 114, at 42–48 (discussing the assertion of executive privilege by Presidents Kennedy, Johnson, Nixon, and others).

dent Theodore Roosevelt declined to produce documents in response to a 1909 Senate request to the Attorney General concerning whether the DOJ had initiated a particular antitrust investigation:

I have instructed the Attorney General not to respond to that portion of the resolution which calls for a statement of his reasons for non-action. I have done so because I do not conceive it to be within the authority of the Senate to give directions of this character to the head of an executive department, or to demand from him reasons for his actions. Heads of the executive departments are subject to the Constitution, and to the laws passed by Congress in pursuance of the Constitution, and to the directions of the President of the United States, but to no other direction what ever.³⁴²

The most frequent assertions of executive privilege prior to the Nixon Administration occurred during the two terms of Dwight Eisenhower's presidency. President Eisenhower was the first to use the term "executive privilege," and he utilized that doctrine on more than forty occasions.³⁴³ The most famous of these invocations of privilege came during the Army-McCarthy hearings. Congressional investigators requested information concerning discussions between an Army lawyer, top White House aides, and the Attorney General, but President Eisenhower instructed the Secretary of Defense not to allow employees to testify concerning those discussions:

Because it is essential to efficient and effective administration that employees of the Executive Branch be in a position to be completely candid in advising with each other on official matters, and because it is not in the public interest that any of their conversations or communications, or any documents or reproductions, concerning such advice be disclosed, you will instruct employees of your Department that in all of their appearances before the Subcommittee of the Senate Committee on Government Operations regarding the inquiry now before it they are not to testify to any such conversations or communications or to produce any

³⁴² S. DOC. NO. 60-635, at 2 (1909).

³⁴³ MARK J. ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY* 39 (2d ed. Univ. Press of Kan. 2002) (1994) [hereinafter ROZELL, *EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY*]; see also Robert Kramer & Herman Marcuse, *Executive Privilege—A Study of the Period 1953–1960* (pts. 1 & 2), 29 GEO. WASH. L. REV. 623, 626 (1961), 29 GEO. WASH. L. REV. 827 (1961) (arguing "that the congressional power to investigate is not superior to executive privilege" and believing that the Founders did not "prefer[] Congress over the President here," nor did "Congress's power to create and abolish Executive agencies and to appropriate funds for their operation carries with it the absolute and unrestricted power to supervise, to inspect and to control the execution of laws to such an extent that executive privilege would be destroyed").

such documents or reproductions. This principle must be maintained regardless of who would be benefited by such disclosures.³⁴⁴

President Eisenhower was particularly blunt in describing his response to Senator McCarthy's demands for information. He advised a group of Republican legislators that "[a]ny man who testifies as to the advice he gave me won't be working for me that night," and went on to elaborate that "[t]hose people who have a position here in this government because of me, those people who are my confidential advisors are not going to be subpoenaed."³⁴⁵ Notwithstanding the dramatic and highly contentious nature of the Army-McCarthy hearings, at no time did Senator McCarthy respond to the President's claims of privilege by threatening to seek a contempt of Congress citation against executive branch officials who refused to testify or disclose documents to his committee. The reason for Congress's failure to use either its inherent contempt power or the statutory alternative of criminal contempt of Congress was certainly not its general reluctance to impose contempt sanctions. During this period the Houses of Congress adopted contempt resolutions against private witnesses over a hundred times.³⁴⁶

The Watergate era marked a change in the threatened use of contempt of Congress citations against executive branch officials. In the mid-1970s, congressional committees first began to raise the threat of contempt of Congress to enforce demands for information from the executive branch. Interestingly, however, during the congressional investigations of Watergate itself, Congress never resorted to the sanction of contempt of Congress, in spite of numerous dramatic assertions of executive privilege by President Nixon.

It was not until 1982 that a House of Congress cited an executive branch official for contempt of Congress for asserting the President's claim of executive privilege, and in that case Congress utilized the statutory criminal contempt process, not its own inherent authority to arrest the official. The House cited EPA Director Anne Gorsuch for contempt of Congress after President Reagan directed Gorsuch to assert executive privilege and withhold sixty-four documents in response to a House committee subpoena.³⁴⁷ After the House cited

³⁴⁴ Letter from Dwight D. Eisenhower, President of the United States, to the Secretary of Defense Directing Him to Withhold Certain Information from the Senate Committee on Government Operations, 3 PUB. PAPERS 483-84 (May 17, 1954).

³⁴⁵ FRED I. GREENSTEIN, *THE HIDDEN-HAND PRESIDENCY: EISENHOWER AS LEADER* 205 (1982).

³⁴⁶ See BECK, *supra* note 63, at 14.

³⁴⁷ See H.R. REP. NO. 97-968, at 15 (1982).

Administrator Gorsuch for contempt,³⁴⁸ the U.S. Attorney refused to refer the contempt citation to a grand jury.³⁴⁹ In response to the contempt citation against Administrator Gorsuch, the DOJ's OLC issued the Olson Memorandum, which reached two principal conclusions: (1) Congress could not constitutionally compel the executive branch to initiate criminal proceedings against a particular individual, and (2) it would be unconstitutional to prosecute an executive branch official for contempt of Congress for asserting the President's claim of executive privilege.³⁵⁰ OLC later issued the Cooper Memorandum, which stated that, based upon the findings of the Olson Memorandum, the DOJ would not refer to a grand jury any contempt citation issued against an executive official who asserted the President's claim of executive privilege.³⁵¹ Thus, in response to Congress's first assertion of its authority to utilize the contempt of Congress statute in an executive privilege dispute, the executive branch immediately contested that power and determined that Congress had no constitutional authority to utilize the contempt statute in such a manner. Subsequently, Congress has attempted to utilize the contempt of Congress statute in response to the President's claim of executive privilege on several occasions, and in each case, the DOJ has cited the Olson and Cooper Memoranda and refused to proceed further with the contempt citation. Thus, the executive branch has not only failed to acquiesce in Congress's attempted use of the statute, but has vigorously disputed Congress's authority to do so.

Even after having been frustrated in its attempted use of the contempt of Congress statute, however, Congress never attempted to utilize its inherent contempt authority to enforce its claim for documents in an executive privilege dispute. We do not know Congress's reasons for failing to utilize this procedure. Congress may have recognized the futility of the inevitable standoff that would result from such an effort, or it may have concluded that it would be politically unwise to assert its own unilateral power to arrest the official rather than seek

³⁴⁸ See H.R. Res. 632, 97th Cong. (1982), reprinted in H.R. REP. NO. 98-323, at 9-10 (1983).

³⁴⁹ See *Examining and Reviewing the Procedures That Were Taken by the Office of the U.S. Attorney for D.C. in Their Implementation of a Contempt Citation That Was Voted by the Full House of Representatives Against the Then Administrator of the Environmental Protection Agency, Anne Gorsuch Burford: Hearing Before the H. Comm. on Public Works and Transportation*, 98th Cong. 29-30 (1984).

³⁵⁰ See Olson Memorandum, *supra* note 194, at 102 ("[A]s a matter of statutory interpretation and the constitutional separation of powers, we believe that the contempt of Congress statute was not intended to apply and could not constitutionally be applied to an Executive Branch official who asserts the President's claim of executive privilege in this context.").

³⁵¹ See Cooper Memorandum, *supra* note 197, at 85.

judicial punishment for the decision to ignore the subpoena. The important fact is that, for whatever reason, Congress has never attempted to arrest an executive branch official for asserting the President's claim of executive privilege in response to a congressional subpoena. Thus, not only is there no historical support for Congress's use of such authority, Congress's repeated failure to use its power in the context of hundreds of executive privilege disputes is strong evidence that Congress possesses no such authority.

B. Congress's Need to Utilize its Inherent Contempt Power in Executive Privilege Disputes

As previously noted, the recent advocates of Congress's use of its inherent contempt power in executive privilege disputes have argued that the power is necessary in order for Congress to protect its right to investigate the executive branch. Josh Chafetz has argued that "in order for this oversight power to be effective in rooting out executive branch malevolence and incompetence, Congress must have access to precisely that information that the executive does not wish to turn over—that is, it must have the power to hold executive branch officials in contempt."³⁵² Michael Zuckerman has echoed this argument:

Congress can hardly accept Executive prosecutorial discretion stonewalling its contempt citations. Doing so has thwarted public accountability in cases where Congress has been unable to obtain the information that it desired. Especially when investigating the Executive Branch, delegating to the [DOJ] . . . the task of enforcing subpoenas "leaves Congress beholden to hostile Executive Branch officials" whose own administration might be under investigation. Even with regard to the judiciary, delegating the punishment power of the Congress to the judiciary through prosecution in federal court may result in "impermissible judicial meddling into the internal rules and procedures of the Houses." In the end, undue interference by either the Executive or the courts cannot be in the national interest, since the preservation of a strong direct contempt power serves the interests of the People.³⁵³

This gloomy view of Congress's ability to enforce its investigative demands against the executive branch is not shared by the principal institutional advocate for Congress's constitutional prerogatives. Louis Fisher, the leading separation of powers expert at the Congressional Research Service and the most respected proponent of congressional power, conducted a thorough review of clashes between the executive branch and Congress over the scope of Congress's in-

³⁵² Chafetz, *supra* note 18, at 1145.

³⁵³ Zuckerman, *supra* note 18, at 64.

vestigative power.³⁵⁴ His ultimate conclusion was that “Congress can win most of the time—if it has the will—because its political tools are formidable.”³⁵⁵

Indeed, Congress has been so effective at forcing the executive branch to comply with investigative demands that a number of scholars have argued that it is the President who needs additional protection in order to protect his constitutional prerogatives. In 1997, for example, Randall Miller argued that:

A fair assessment of the battles between Congress and the executive branch over access to documents, however, reveals that, without access to a civil proceeding, the President cannot effectively assert executive privilege to resist disclosure once a dispute with Congress escalates beyond the subpoena stage.³⁵⁶

Thus, Miller argued, because the President is so powerless during the negotiation and accommodation process, courts should agree to adjudicate executive disputes in order to protect the President’s prerogative.³⁵⁷ William Marshall has argued:

An unconstrained congressional investigative power, like an unchecked Executive, generates its own abuses. Unfortunately, the practices currently governing Congress’s use of this power have evolved to the point where there are few effective constraints on its exercise; highly partisan committees, for example, can initiate and pursue investigations of the President without so much as a debate. The invitation for congressional abuse is therefore apparent.³⁵⁸

As a result, Professor Marshall argues in favor of increased procedural checks on Congress’s investigative power in order to prevent congressional overreaching and protect essential executive prerogatives.³⁵⁹

The history of executive privilege disputes in the last thirty years can help to explain how Miller and Marshall could reach conclusions so diametrically opposed to those of Chafetz and Zuckerman. With respect to the dispute involving EPA Administrator Gorsuch, Zuckerman argues that, along with the Miers and Bolten cases, the dispute shows that “the Executive’s refusal to prosecute may result in unremedied obstruction to the legislative process, making a ‘mockery’ of the legislative power.”³⁶⁰ Yet, far from being an example of Congress’s need to utilize its inherent contempt power, the Gorsuch case is a

354 See FISHER, *supra* note 24, at 160–95.

355 Louis Fisher, *Congressional Access to Information: Using Legislative Will and Leverage*, 52 DUKE L.J. 323, 325 (2002).

356 Miller, *supra* note 114, at 670.

357 *Id.* at 679.

358 Marshall, *supra* note 28, at 784.

359 *Id.* at 820.

360 Zuckerman, *supra* note 18, at 63.

prime example of why Congress prevails in executive privilege battles even without the ultimate sanction of contempt. The DOJ did not simply refuse to prosecute Gorsuch for contempt and then stonewall the congressional investigating committee. Instead, the Department filed a lawsuit, rather provocatively styled *United States v. House of Representatives*,³⁶¹ in order to seek a declaratory judgment that the assertion of executive privilege should prevail over the congressional subpoena.³⁶² The district court rejected the Department's attempt to seek judicial resolution of the dispute and urged the parties to negotiate:

The difficulties apparent in prosecuting Administrator Gorsuch for contempt of Congress should encourage the two branches to settle their differences without further judicial involvement. Compromise and cooperation, rather than confrontation, should be the aim of the parties.³⁶³

Within two weeks, without the use of its coercive contempt power and without any judicial intervention, Congress succeeded in obtaining all of the subpoenaed documents.³⁶⁴ President Reagan acknowledged that political pressure generated by Congress and the press had forced him to release the documents to Congress:

[I]t is now clear that prolonging this legal debate can only result in a slowing down of the release of information to Congress, therefore fostering suspicion in the public mind that, somehow, the important doctrine of executive privilege is being used to shield possible wrong doing.³⁶⁵

Stanley Brand, counsel to the Clerk of the House of Representatives, called the President's decision to release the documents a "total capitulation."³⁶⁶

The House not only succeeded in obtaining all of the requested documents, but its Judiciary Committee also launched a probe into the DOJ's actions during the Gorsuch controversy, including its role in advising President Reagan to assert executive privilege.³⁶⁷ The Judiciary Committee, without the use of any contempt sanctions, forced

³⁶¹ 556 F. Supp. 150 (D.D.C. 1983). Stanley Brand, counsel to the clerk of the House of Representatives at the time the lawsuit was filed, noted that "[w]hen the Department of Justice brought an unprecedented and ill-fated suit against the House of Representatives to enjoin and declare illegal a House contempt citation against the EPA administrator for refusal to produce documents, it presumptuously and with no statutory authority sued in the name of the United States." Stanley M. Brand, *Battle Among the Branches: The Two Hundred Year War*, 65 N.C. L. REV. 901, 904 (1987).

³⁶² *House of Representatives*, 556 F. Supp. at 152.

³⁶³ *Id.* at 153.

³⁶⁴ Leslie Maitland, *House Unit to Get Subpoenaed Data*, N.Y. TIMES, Feb. 17, 1983, at B11.

³⁶⁵ Philip Shabecoff, *Deep Regret Voiced*, N.Y. TIMES, Mar. 10, 1983, at B12.

³⁶⁶ *Id.*

³⁶⁷ H.R. REP. NO. 99-435, at 612-40 (1985).

the DOJ to disclose its own internal documents concerning the assertion of privilege and required the officials involved in the dispute to testify under oath.³⁶⁸ Ultimately, the Judiciary Committee's report accused Assistant Attorney General Theodore B. Olson of giving false and misleading testimony at his appearance before the Committee on March 10, 1983.³⁶⁹ This report led to an independent counsel investigation of Olson, who was exonerated only after a prolonged three-year investigation.³⁷⁰ As Randall Miller later noted, the Judiciary Committee investigation

promised to cause future executive branch attorneys to think twice about recommending that a president assert executive privilege. The Olson investigation suggests that a sufficiently motivated faction in Congress can effectively punish executive officers for an assertion of executive privilege by launching an investigation into the propriety of the assertion of the privilege itself.³⁷¹

Thus, rather than supporting the argument that Congress needs coercive contempt authority in order to obtain documents from the executive branch, the Gorsuch episode rather spectacularly supports precisely the opposite conclusion.

President Reagan was equally unsuccessful in asserting executive privilege following the nomination of then-Associate Justice William H. Rehnquist to be Chief Justice of the Supreme Court. During Rehnquist's confirmation hearings, the Senate Judiciary Committee demanded that the DOJ disclose memoranda prepared when he was in charge of the OLC during the first years of the Nixon Administration.³⁷² President Reagan asserted executive privilege on the ground that the OLC documents reflected Rehnquist advice to the White

³⁶⁸ *Id.*

³⁶⁹ *Id.*

³⁷⁰ See Ronald J. Ostrow, *Independent Counsel Explains Why She Didn't Prosecute Figure in '83 EPA Probe*, L.A. TIMES, Mar. 21, 1989, at A17.

³⁷¹ Miller, *supra* note 114, at 660. The *in terrorem* effect of the Olson investigation was made explicit by the comments of one former White House official who spoke at a symposium on congressional oversight:

When I was working at the White House, I recall a situation where I was discussing with members of a congressional investigative staff the niceties of legal questions involving whether they were entitled to see certain predecisional draft documents; and the staffers said to me, 'The last person who talked to us like this and who raised questions like this was Ted Olson.' That does get your attention

Symposium, *Reforming Government Through Oversight: A Good or Bad Idea?*, 13 J.L. & POL. 557, 574 (1997).

³⁷² See Howard Kurtz & Ruth Marcus, *Democrats Seek to Subpoena Papers*, WASH. POST, Aug. 2, 1986, at A1 (reporting the steps taken to subpoena Chief Justice-designate Rehnquist's papers from the Nixon Administration).

House.³⁷³ The Judiciary Committee refused to proceed on Rehnquist's nomination until it received the documents and, within five days after President Reagan's assertion of privilege, the Committee had all of the documents.³⁷⁴

President Clinton was spectacularly unsuccessful in asserting executive privilege claims.³⁷⁵ President Clinton lost highly publicized battles in the courts to establish a temporary immunity to civil suit,³⁷⁶ a "protective function privilege" for secret service agents,³⁷⁷ and an attorney/client privilege with respect to advice given to the President by White House lawyers.³⁷⁸ In addition, President Clinton lost some notable executive privilege battles with Congress. For example, in 1996, the House Government Reform and Oversight Committee began an investigation into allegations that personnel in the White House Travel Office had been fired for political reasons, and the committee subpoenaed documents from the White House.³⁷⁹ The White House produced over 40,000 pages of documents, but asserted executive privilege and refused to disclose approximately 3,000 pages of documents to the Committee.³⁸⁰ In an attempt to avoid a House vote on the contempt of Congress resolution against White House counsel Jack Quinn, to whom the subpoena had been directed, the

373 See Stanley I. Kutler, *Executive Privilege Redux: It's a Tricky Business*, CHRISTIAN SCI. MONITOR, Sept. 22, 1986, at 16 (discussing the Reagan Administration's motivations for asserting executive privilege with regard to the Rehnquist documents).

374 Ronald J. Ostrow & David Savage, *Senate Panel to Receive Rehnquist Documents; Administration Ends Impasse on Memos Written as Legal Advisor to Nixon; Scalia Hearings Open*, L.A. TIMES, Aug. 6, 1986, at A1.

375 For accounts highlighting the various episodes in which Congress muscled the Clinton Administration, see generally, Fisher, *supra* note 355; Neil Kinkopf, *Executive Privilege: The Clinton Administration in the Courts*, 8 WM. & MARY BILL RTS. J. 631 (2000); Turley, *supra* note 3.

376 *Clinton v. Jones*, 520 U.S. 681, 692 (1997) ("[The President's argument]—that 'in all but the most exceptional cases,' the Constitution affords the President temporary immunity from civil damages litigation arising out of events that occurred before he took office—cannot be sustained on the basis of precedent.").

377 *In re Sealed Case*, 148 F.3d 1073, 1079 (D.C. Cir. 1998) (per curiam) ("The Secret Service has failed to carry its heavy burden . . . of establishing the need for the protective function privilege [to prevent compelled testimony from agents who are in close proximity to the President] it sought to assert in this case.").

378 *In re Grand Jury Proceedings*, 5 F. Supp. 2d 21, 38 (D.D.C. 1998) (denying Deputy Counsel to the President Bruce Lindsey the right to assert the attorney-client privilege in connection with advice given to the President), *aff'd in part, rev'd in part sub nom.*, *In re Lindsey*, 158 F.3d 1263 (D.C. Cir. 1998).

379 See David Johnston, *Subpoena Issued in Travel Office Inquiry*, N.Y. TIMES, Jan. 6, 1996, at A7 (discussing the House committee's subpoena of David Watkins, who had drafted the memorandum at the center of the controversy).

380 See David Johnston, *Panel Acts to Gain Travel Office Papers*, N.Y. TIMES, May 10, 1996, at A26 (discussing President Clinton's invocation of executive privilege).

White House produced approximately 1,000 additional pages of documents and a privilege log with an index of the remaining undisclosed documents.³⁸¹ Eventually, however, the political pressure became too intense for the White House to resist and, on June 25, 1996, the White House agreed to provide the Committee with access to the remaining documents under an agreement that allowed the Committee to take notes on the documents but not copy them unless they related to improper contacts with the FBI.³⁸²

The George W. Bush Administration was only partially successful in asserting executive privilege even with a Republican majority in Congress. In 2001 the House Committee on Government Reform conducted hearings into allegations of FBI corruption in its Boston office with respect to organized crime investigations during the 1960s and 1970s.³⁸³ The committee, chaired by Republican Dan Burton, demanded access to ten particularly crucial documents relating to the potential misconduct.³⁸⁴ President Bush asserted executive privilege in order to protect the confidentiality of the FBI documents.³⁸⁵ Ultimately, the two sides reached an accommodation that allowed the House committee to view six of the ten disputed documents.³⁸⁶ Thus, even with a sympathetic Republican-dominated committee, President Bush was forced to compromise on his claim of privilege.

The reasons for Congress's ability to obtain executive branch documents, even without imprisoning executive branch officials, have been well documented. Louis Fisher has suggested that judicial enforcement of congressional investigative demands is rarely necessary because "of the superior political muscle by a Congress determined to exercise the many coercive tools available to it."³⁸⁷ These powers include Congress's appropriation power,³⁸⁸ Congress's impeachment power,³⁸⁹ Congress's power to refuse to confirm presidential nominees,³⁹⁰ and the political pressure that Congress can generate when it

381 Eric Schmitt, *White House Gives Committee More Papers in Dismissal Case*, N.Y. TIMES, May 31, 1996, at A20.

382 Jessica Lee, *White House to Let Panel See Documents*, USA TODAY, June 26, 1996, at 8A.

383 *See Investigation into Allegations of Justice Department Misconduct in New England, Vol. 1: Hearings Before the H. Comm. on Gov't Reform*, 107th Cong. (2001).

384 *See* Rozell & Sollenberger, *Bush Administration*, *supra* note 200, at 6–7 (discussing the deal reached allowing the committee to view some but not all documents).

385 *See* Neil A. Lewis, *Bush Claims Executive Privilege in Response to House Inquiry*, N.Y. TIMES, Dec. 14, 2001, at A26 (discussing President Bush's first invocation of executive privilege).

386 Rozell & Sollenberger, *Bush Administration*, *supra* note 200, at 7.

387 Fisher, *supra* note 355, at 323.

388 *Id.* at 326–33.

389 *Id.* at 333–35.

390 *Id.* at 336–39.

issues a subpoena and initiates contempt proceedings, even if the executive branch refuses to proceed with prosecution of a contempt citation.³⁹¹ As a result, Fisher concludes that “Congress has the theoretical edge because of the more than adequate tools at its disposal. What it needs primarily is motivation, the staying power to cope with a long and frustrating battle, and an abiding commitment to honor its constitutional purpose.”³⁹²

Congress’s political weapons are amplified by the media, which is generally hostile to presidential invocations of executive privilege and which effectively keeps the issue of a disclosure in the public eye. As William Marshall has noted:

Congress also has an institutional ally assisting it in its oversight requests—the media. This is critically important because, in a political battle, public opinion is often the referee and the media is the vehicle through which public opinion will be informed. That the media will generally be on the side of disclosure is, of course, not surprising, because the business of the media is to seek information and, as such, it is institutionally disposed to favor disclosure in any given case.³⁹³

Moreover, the press has become increasingly focused on “scandal journalism” since Watergate and thus has an institutional predilection towards focusing on allegations of corruption or coverups. As one observer noted,

[t]his scandal obsessed industry, whether it is on radio, TV, or in the print media, generates tremendous pressure on the congressional investigatory system: (1) to identify potential scandals; (2) to commence investigations of them; (3) to appoint the ‘right people’ to run those investigations; and (4) to leak information regarding the investigative process.³⁹⁴

As a result:

[B]ecause of the media, the purported trump card in the President’s hand, the claim of executive privilege, is actually a joker. Because the press (and to a lesser extent, the Congress) equates a claim of executive privilege with that of a cover-up, the result is that the claim of executive privilege has become a political liability to the President who invokes it.³⁹⁵

³⁹¹ *Id.* at 339–59.

³⁹² *Id.* at 401.

³⁹³ Marshall, *supra* note 28, at 810; *see also* Peterson, *supra* note 111, at 628–29 (“Once a dispute reaches the subpoena level, the press becomes a major factor in the political conflict. Past experience suggests that Congress can use the press as a substantial weapon to obtain requested documents. As long as the need to uncover information within the executive branch has appeared legitimate, the press has been sympathetic to Congress’s interests and quite skeptical of claims of executive privilege.”).

³⁹⁴ Richard J. Leon, *Congressional Investigations: Are Partisan Politics Undermining Our Vital Institutions?*, 31 *SUFFOLK U. L. REV.* 825, 830 (1998).

³⁹⁵ Marshall, *supra* note 28, at 811 (footnotes omitted).

Constant comparisons to Watergate³⁹⁶ and editorial opposition to assertions of executive privilege³⁹⁷ add to the news coverage and further increase the political pressure on the President to abandon his assertion of privilege. Thus, it is hardly surprising that Congress has done so well in overcoming executive branch resistance to its investigative demands.

III. THE ARGUMENT THAT CONGRESS SHOULD ALWAYS PREVAIL IN ANY DISPUTE OVER ACCESS TO EXECUTIVE BRANCH INFORMATION

The final, and most telling, flaw with the arguments for Congress's use of its inherent contempt authority is that they rest on the assumption that Congress's investigative claims are always superior to the President's claim of privilege and that Congress should have the right to determine unilaterally when the executive must disclose information as to which the President has asserted a claim of executive privilege. Heidi Kitrosser has made this presumption explicit in a recent article in which she argues that Congress's determination that documents should be disclosed should be constitutionally conclusive.³⁹⁸ According to Kitrosser, Congress is constitutionally permitted to overcome executive privilege in three ways:

First, Congress can pass statutes granting the public access rights to categories of executive branch information. Second, Congress can pass statutes giving itself and its committees and subcommittees subpoena power, subject to contempt penalties, to seek information from the executive branch. Third, Congress can create agencies similarly empowered to demand information from the executive branch.³⁹⁹

Because Congress's right to seek information should always prevail over executive branch assertions of privilege, Kitrosser argues, if lawsuits arise out of Congress's contempt proceedings "any executive privilege claims made in response should not prevail."⁴⁰⁰ Thus, Kitrosser concludes:

[I]t is theoretically significant to accord legislative access decisions constitutionally final and enforceable status. The according of such status could highlight the underlying logic outlined throughout this paper: that executive privilege clashes fundamentally are policy debates about the merits of secrecy versus openness, that constitutional structure suggests that skepticism as to pro-secrecy arguments is called for, and that

³⁹⁶ See Miller, *supra* note 114, at 673 (discussing congressional members' tendency to view an assertion of executive privilege as part of an intrabranched battle).

³⁹⁷ *Id.* at 671–73.

³⁹⁸ Kitrosser, *supra* note 19, at 492–93.

³⁹⁹ *Id.* at 528.

⁴⁰⁰ *Id.* at 528 n.187.

constitutional structure ultimately militates toward resolving such policy debates through legislation to ensure stable political mechanisms to keep secrecy shallow and politically checkable.⁴⁰¹

This argument, and the parallel arguments in favor of the use of Congress's inherent contempt power, are essentially arguments that there is no constitutional basis for executive privilege or that, at most, Congress has the conclusive right to determine whether executive privilege should be recognized. It is beyond the scope of this Article to revisit the issue whether the President has any constitutional right to assert executive privilege, a subject about which entire books have been written.⁴⁰² It will suffice for the present purposes to make a few observations in response to the suggestion that Congress should always prevail. First, the argument that the President has no constitutionally based privilege is inconsistent with both Supreme Court case law and the long history of presidential assertions of privilege, some of which have prevailed through congressional acquiescence and some of which have not.⁴⁰³ Second, if one assumes that the President has some right to assert executive privilege and Congress has a corresponding right to investigate the executive branch, then whatever mechanism is utilized to resolve confrontation between the constitutional rights cannot be committed exclusively to one of the competing branches. As Congress's own strongest advocate, Louis Fisher, has pointed out:

These implied powers collide whenever Congress, in an attempt to carry out its investigative function, is denied information by a President who invokes executive privilege. Which power should yield? It would be satisfying to discover a formula that is both unequivocal and trustworthy, but too much depends on individual circumstances. To subordinate one branch to another would destroy their co-equal status and disrupt the system of separated powers. We are left with a search for general boundaries and guideposts that satisfy constitutional principles as well as practical realities.⁴⁰⁴

Moreover, the arguments in favor of Congress's constitutionally conclusive right to determine all disputes over executive privilege rest on several faulty presumptions about the way such a process would operate. First, the advocates of congressional hegemony implicitly, and at times explicitly, argue that Congress can be trusted both to ad-

401 *Id.* at 530.

402 *See, e.g.,* BERGER, *supra* note 114; ROZELL, EXECUTIVE PRIVILEGE: THE DILEMMA OF SECRECY AND DEMOCRATIC ACCOUNTABILITY, *supra* note 114; ROZELL, EXECUTIVE PRIVILEGE: PRESIDENTIAL POWER, SECRECY AND ACCOUNTABILITY, *supra* note 343.

403 *See supra* text accompanying notes 311–55.

404 FISHER, *supra* note 24, at 160.

judicate the President's claim of privilege fairly and not to abuse its investigative power, even if it always has the final say on what information must be produced. For example, Josh Chafetz has argued that "[n]onjudicial institutions can still behave judiciously, and, as we have seen, the congressional committees investigating Nixon were careful to behave in such a manner. Indeed, so were the congressional committees investigating the United States Attorneys firings."⁴⁰⁵

This faith in Congress's ability to respond fairly and dispassionately to presidential claims of privilege would strike any experienced observer of Washington politics as less than accurate, to say the least. Congress has a huge incentive to use its investigative power "to engage in political mischief."⁴⁰⁶ Indeed, as William Marshall (who should be in a position to know, having served as a Deputy Counsel to the President in the Clinton White House) has pointed out even when investigations uncover no wrongdoing they:

[M]ay inflict political damage on a president. They can embarrass his administration; distract from his agenda; undercut his authority; trigger further inquiries; and lead to lapses or errors in compliance. They can do all of this (and more) with little or no cost to those who choose to wield the investigative power. It is no wonder, then, that in times of divided government, congressional investigations are a political weapon of choice.⁴⁰⁷

Complaints about Congress's incentive to politicize the investigative process and unfairly target the executive branch have come from both sides of the political aisle. Theodore Olson (head of the OLC in the Reagan Administration and President Bush's first Solicitor General) has argued that Congress utilizes its investigative authority to interfere with the President's right to supervise officials within the executive branch.⁴⁰⁸ This type of interference was testified to by an audience member at the Symposium at which Mr. Olson spoke:

I wanted to follow on the point that Ted Olson made about the potential threat to separation of powers through the misuse of the oversight process. When I was serving in the Bush administration at EPA, as General Counsel, I was told that if I made a certain interpretative decision, I would be investigated. I did not make that decision; I was investigated. That seems to me to be a very clear misuse of the process . . . I think we'd all agree that, increasingly, the game is being played in a very nasty way.⁴⁰⁹

⁴⁰⁵ Chafetz, *supra* note 18, at 1155.

⁴⁰⁶ Marshall, *supra* note 28, at 782.

⁴⁰⁷ *Id.*

⁴⁰⁸ Symposium, *supra* note 371, at 571–72.

⁴⁰⁹ *Id.* at 578.

Professor Christopher Schroeder (who has experience in both branches as acting head of the OLC and Chief Counsel of the Senate Judiciary Committee) has characterized some congressional investigations as “vendetta oversight, oversight that seems primarily interested in bringing someone down, usually someone close to the President or perhaps the President himself.”⁴¹⁰ Schroeder also noted that the increasing amount of oversight aimed solely at inflicting damage on the opposition leads “inevitably . . . to . . . a movement towards partisan divisions which are not productive.”⁴¹¹ Given these persuasive first-hand observations of the political context of information disputes, it is simply not plausible to assume that Congress, with all of its political incentives to attack the President (at least a President of an opposing party) would ever give a fair hearing to a President’s claims of privilege. Each member has an individual incentive to maximize his or her chance of getting reelected and, if an investigation can inflict damage on the opposition party, not only does that bring publicity to the individual member, but also additional funding and support from within the member’s own party. As a result, oversight has become increasingly partisan and focused on inflicting damage on the opposition party.⁴¹²

Examples of such partisan investigations abound. The so-called Whitewater Hearings, initiated to investigate President Clinton’s involvement in an allegedly suspicious land deal while he was governor of Arkansas, went on for years and encompassed subjects so far afield that they bore no relationship to the original purpose of the investigation. For example, one witness was originally called to testify about his knowledge of the Whitewater land deal, but by the time of his fourth appearance before the Whitewater Committee, the questioning had turned to the 1985 procurement of the Arkansas state police radio system.⁴¹³ Republicans might make a similar claim about the House Judiciary Committee’s investigation of the DOJ’s decision to

⁴¹⁰ *Id.* at 565.

⁴¹¹ *Id.*

⁴¹² *Id.* at 565–66.

⁴¹³ *Investigation of Whitewater Development Corporation and Related Matters: Hearings on the Inquiry into Whether Improper Conduct Occurred with Respect to the Operation, Investments, and Activities of Whitewater Development Corporation, Madison Guaranty Savings & Loan, Capital Management Services, and Related Matters Before the Special Comm. to Investigate Whitewater Dev. Corp. and Related Matters of the S. Comm. on Banking, Hous., & Urban Affairs, 104th Cong. vol. XIII, at 2520–41 (1996) (testimony of Bob J. Nash, Director of the White House Personnel Office). Prior to his testimony on April 30, 1996, Bob Nash had testified before the subcommittee on January 31, 1996, see *id.* vol. XII, at 851–925, and had been deposed by the subcommittee staff on two separate occasions, see *id.* vol. XIV, at 319–55; vol. XVI, at 3999–4092.*

assert executive privilege in the Gorsuch case during the Reagan Administration.⁴¹⁴

The advocates of congressional hegemony, however, make no mention of even the most obvious examples of congressional abuse of the investigative process. For example, Michael Zuckerman has argued:

To the extent fairness is a concern, Congress is aware of the potential for abuse of this process and has acted to minimize this risk; of the fifteen persons charged with failure to comply with subpoenas between the period 1787–1943, none was referred to the courts and only two were punished by Congress—showing that Congress is not a lawless body; it exercises restraint.⁴¹⁵

The choice of this time period conveniently omitted the post-war period during which the House Un-American Activities Committee and Senate investigations conducted by Senator Joseph McCarthy resulted in hundreds of citations for contempt of Congress and the subsequent imprisonment of those cited.⁴¹⁶ By some estimates 10,000 to 12,000 people lost their jobs as a result of the McCarthy-era investigations.⁴¹⁷ In the film and television industry alone, over 300 people lost their jobs and were blacklisted from further employment.⁴¹⁸ One could go on at length about the devastation caused by these congressional investigations; it is enough for the purpose of this Article to state that history dramatically and conclusively refutes the notion that the congressional investigation is invariably benign and conducted in a responsible manner.

Finally, it is worth noting that the evidence of the potential abuse of Congress's investigative power arises in the context of a relationship with the executive branch in which each party has an acknowledged constitutional interest and the Supreme Court has blessed neither interest as absolute. If Congress were given the conclusive constitutional authority to determine what information should be disclosed by the executive branch, it seems likely that investigative overreaching would increase dramatically. At the moment, Congress's demands are moderated by the negotiation and accommoda-

414 See *supra* text accompanying notes 347–51.

415 Zuckerman, *supra* note 18, at 66 (footnote omitted).

416 ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* xiii (1998); see also ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* (2d ed. 2002).

417 *Id.*

418 See PAUL BUHLE & DAVE WAGNER, *HIDE IN PLAIN SIGHT: THE HOLLYWOOD BLACKLISTEES IN FILM AND TELEVISION, 1950–2002* (2003) (discussing political exiles in American life); see also Schrecker, *supra* note 346 (discussing the anti-Communist frenzy of the 1940s and 1950s).

tion process, which constrains both branches in the assertion of their constitutional authority. A Congress possessing absolute and unlimited authority to command disclosure of documents would be limited only by the political process, which, as we have seen, is a frail constraint at best.⁴¹⁹

IV. WHY THE COURTS SHOULD RESIST A MORE ACTIVE ROLE IN RESOLVING EXECUTIVE PRIVILEGE DISPUTES BETWEEN CONGRESS AND THE PRESIDENT

The final question to address is the issue of the justiciability of executive privilege disputes between Congress and the President. The conventional wisdom has been that the courts should stay out of this process and that the branches should be left to reach a negotiated resolution of the dispute. David O'Neil has recently argued, however, that the conventional wisdom is deeply flawed and that the courts "must play some substantive role in a coherent system for resolving interbranch battles over information."⁴²⁰ O'Neil's argument can be summed up as follows: First, the traditional negotiation-accommodation model of resolving executive privilege disputes is based on a theory identical to that first articulated by Professor Herbert Wechsler in the context of federalism.⁴²¹ Just as Wechsler argued that state interests are adequately protected in Congress because the composition of the legislature is designed to reflect and protect local interests, the negotiation-accommodation theory is based on the notion that the members of Congress will adequately protect their own interests during executive privilege disputes.⁴²² Second, executive privilege disputes are not fundamentally different from other separation of powers disputes that the court has resolved.⁴²³ Third, the negotiation-accommodation process incorrectly assumes that Congress will protect its own institutional prerogative with respect to gathering information despite the fact that political incentives are not necessarily

⁴¹⁹ See Marshall, *supra* note 28, at 806, 810 (stating that political checks on congressional investigative power are limited by the way in which standing committees are constituted and by the role of the media, which invariably is on the side of disclosure).

⁴²⁰ O'Neil, *supra* note 20, at 1083.

⁴²¹ See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546 (1954) (arguing that "the existence of the states as governmental entities and as the sources of the standing law is in itself the prime determinant of our working federalism, coloring the nature and the scope of our national legislative processes from their inception").

⁴²² O'Neil, *supra* note 20, at 1095–1101.

⁴²³ *Id.* at 1102–18.

consistent with the institutional interest of Congress.⁴²⁴ Therefore, the constitutional prerogatives of Congress will not be adequately protected by leaving executive privilege disputes to resolution via the political process.⁴²⁵ Fourth, because the political process alone will not yield a satisfactory allocation of authority, courts must intervene to establish the appropriate constitutional prerogatives of the executive and legislative branches.⁴²⁶

Looking to each of these arguments in turn, it becomes apparent that judicial involvement in executive privilege disputes is not desirable and that the disputes should be resolved through negotiations between the President and Congress. First, there is good reason why no one previously has thought to conflate Wechsler's political safeguards theory with the negotiation-accommodation approach to executive privilege. Wechsler's approach was theoretical and deductive. He argued, based on assumptions about the motivations of individual legislators, that the state's interests should, as a logical matter, be adequately represented in Congress.⁴²⁷ Later critiques of Wechsler's model were based on the observation that the motivations of individual legislators were based much more on partisan politics than fealty to the values of federalism.⁴²⁸ On the other hand, the negotiation-accommodation theory of executive privilege is based upon inductive logic, by those who have participated in the process and observed how Congress and the executive branch interact with one another in executive privilege disputes.⁴²⁹ Of course, the actions of each branch are influenced by politics and not purely the desire to represent the institutional interests of Congress or the President. As Dawn Johnsen has noted:

The reality of congressional oversight of the executive branch is not a neat theoretical world but one that requires the messy give and take of negotiations. The institutional conflicts and political motivations sometimes inherent in this aspect of the relationship between the President

⁴²⁴ *Id.* at 1121–29.

⁴²⁵ *Id.* at 1129.

⁴²⁶ *Id.* at 1136–37.

⁴²⁷ Wechsler, *supra* note 421, at 546–52.

⁴²⁸ See, e.g., Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1487, 1490, 1503–14 (1994) (noting instances where federalism depends on the political process “to ensure an appropriate balance between state and federal governments”); *id.* at 1520 (stating that “[t]he structural protections identified by Wechsler, Choper, and company are marginal at best” in protecting the proper constitutional balance of power between federal and state governments).

⁴²⁹ See, e.g., FISHER, *supra* note 24; Marshall, *supra* note 28; Symposium, *supra* note 408.

and Congress are best resolved through a process that allows for flexibility, a balancing of competing interests, and compromise.⁴³⁰

Second, there are important differences between executive privilege disputes and other separation of powers questions heard by the courts that warrant judicial restraint in addressing the former. The separation of powers disputes that are heard by the courts generally involve the constitutionality of statutes that either unlawfully aggrandized the power of a branch by giving it authority not permitted by the Constitution,⁴³¹ or that arguably restrict the authority of a branch so that it is unable to perform its assigned constitutional functions.⁴³²

These cases involve essentially a binary choice; the statute is either constitutional or unconstitutional, and a court is well equipped to make the constitutional assessment of the statute at issue. Executive privilege disputes, however, involve an infinite variety of fact patterns and institutional interests. The proper method to resolve such a dispute would require a court to balance the need of the congressional committee for access to the documents against the impact on the executive branch if it is required to turn over the documents.⁴³³ Courts have a difficult enough time weighing the impact on their own ability to conduct judicial proceedings when the President asserts a claim of executive privilege;⁴³⁴ it is far more difficult for them to assess the relative impact on each of the two political branches in an executive privilege dispute.

⁴³⁰ Dawn Johnsen, *Executive Privilege Since United States v. Nixon: Issues of Motivation and Accommodation*, 83 MINN. L. REV. 1127, 1139 (1999).

⁴³¹ See, e.g., *Clinton v. New York*, 524 U.S. 417 (1998) (holding that the President may not be granted line item veto by a statute); *Bowsher v. Synar*, 478 U.S. 714 (1986) (holding that Congress may not by statute give the Controller General, who is an officer of Congress, the authority to execute the law); *INS v. Chadha*, 462 U.S. 919 (1983) (holding that Congress may not give itself by statute a legislative veto exercised by one House over executive branch actions); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (holding that Congress may not by statute give itself the authority to appoint members of the Federal Election Commission, who are officers of the United States).

⁴³² See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (holding that Congress may by statute provide for the appointment of an individual counsel to investigate allegations of criminal wrongdoing by high-level executive branch officials and specify that the independent council may only be removed for cause); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 484 (1977) (holding that Congress was permitted by statute to require the presidential papers and records of Richard Nixon to be retained in government control and subject to possible public access).

⁴³³ See, e.g., *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 730–32 (D.C. Cir. 1974) (applying such a method in determining whether the Senate committee could subpoena tape recordings between the President and the presidential aide).

⁴³⁴ See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974).

More important than the court's inability to assess the relative weight to be assigned each branch's claim is the reality that a court is far less able to fashion the appropriate remedy for such a case. A case involving the validity of a statute presents a relatively simple remedial problem. The statute is either constitutional or unconstitutional, and the biggest problem a court typically has is deciding whether an unconstitutional provision is severable. By contrast, executive privilege disputes, particularly as they are resolved through the negotiation-accommodation process, have innumerable possible outcomes. These disputes almost never result in total complete unfettered access by Congress or complete success on the part of the executive branch in blocking any congressional access to documents. More typically, a negotiated settlement of an executive privilege dispute will involve a long list of variables, including the number of documents to be produced, the identity and function of the persons who will be permitted to have access to the documents, whether documents may be copied or whether notes may be taken, whether the documents will be redacted and, if so, whether anyone will be able to view the unredacted originals, the length of time the documents will be made available, and whether and when the documents might be made available to the public. Each one of these variables has endless possible alternatives. For example, a document might be available to the full committee and entire staff or only to the committee members, or only to selected committee members or only to the chair of the committee and the ranking minority member of the committee and staff or only to the chair of the committee and the ranking member of the committee, or only to the chair of the committee. The details of these arrangements are always carefully negotiated by the representatives of Congress and the executive branch, and the final terms and conditions are limited only by the ingenuity and imagination of the negotiators.

A federal court has no way of assessing how to assemble such a combination of terms and conditions in order to resolve an executive privilege dispute. A court has no standards to use in deciding how documents will be disclosed, when they will be disclosed, and to whom and under what terms they will be disclosed. The genius of the negotiation-accommodation process is that those in the best position to assess the impact of all these conditions are the ones who reach a final compromise agreement that strikes an acceptable balance far more effectively than any court could by its unguided selection of appropriate terms and conditions.

Thus, what sets executive privilege disputes most clearly apart from other separation of powers questions is the remedial complexity

of the dispute. This remedial complexity makes executive privilege disputes with Congress unique among separation of powers problems and warrants the judicious abstention of courts from attempting to impose judicially selected terms and conditions to resolve the dispute. Neither O'Neil nor any other advocate of judicial intervention takes into account the remedial uniqueness of executive privilege disputes. Nor do they explain how a court would be able to achieve the same remedial creativity as the negotiation-accommodation process in any principled way.

O'Neil also argues that there is no link between Congress's willingness to defend its institutional prerogatives and the constitutionally appropriate outcome in a particular case.⁴³⁵ Instead, O'Neil argues, Congress will pursue its claims only when it is politically expedient to do so.⁴³⁶ Therefore, the outcome of executive privilege disputes, if left to the negotiation-accommodation process, will be the result of these politically expedient calculations and will not reflect the proper division of authority as required by the Constitution.⁴³⁷

The most obvious problem with this argument is that if it is politically inexpedient for Congress to pursue the negotiations-accommodation process, then why would it be politically expedient for Congress to file litigation to achieve the same result? The difference between executive privilege disputes with Congress and every other separation of powers or federalism dispute is that only Congress may assert its institutional prerogatives, whether through the negotiations-accommodation process or litigation in court. In other separation of powers or federalism disputes, private litigants can be, and often have been, the ones to bring the issue before the courts.⁴³⁸ Therefore, it makes a significant difference whether a court will take cognizance of these individual lawsuits or leave the matter entirely to the political process. Individuals may make up for the lack of political will on the part of Congress or the President by filing litigation that raises the constitutional issue before a court. That is not the case, however, in an executive privilege dispute where, if litigation is

⁴³⁵ See O'Neil, *supra* note 20, at 1119–29 (casting doubt on the assumption that the self-executing checks between Congress and the President “will resolve information disputes in a manner that best reflects the constitutional balance between the branches”).

⁴³⁶ *Id.* at 1122–23.

⁴³⁷ *Id.* at 1137.

⁴³⁸ See, e.g., *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991) (suit brought by nonprofit organization); *Mistretta v. United States*, 488 U.S. 361 (1989) (suit brought by criminal defendant); *INS v. Chadha*, 462 U.S. 919 (1983) (suit brought by would-be deportee).

to be brought, it must be brought by Congress, or at least a committee authorized by Congress to bring suit.

Moreover, although the negotiation-accommodation process may not always produce the constitutionally optimal division of power, it is very likely to produce a constitutionally acceptable resolution and one that is far more artfully crafted than any court could produce. Stephen Lilley has provided a descriptive model of the political resolution of executive privilege disputes that “rejects claims that political compromise generates constitutionally *optimal* outcomes to executive privilege disputes. It instead identifies a more realistic model for the political resolution of executive privilege disputes that focuses on constitutionally *acceptable* outcomes.”⁴³⁹ No one doubts that Antonin Scalia was correct when (as head of the OLC) he described the “hurly-burly, the give-and-take of the political process between the legislative and the executive” that characterizes the resolution of most executive privilege disputes.⁴⁴⁰ It is the very messiness of these disputes that allows the political branches to craft creative solutions that accommodate the interests of each branch. Congress will press for disclosure when it needs disclosure in order to do its job. Congressional motives will inevitably be influenced by politics and its willingness to assert its constitutional prerogatives will to some extent reflect these political motivations. But that will be just as true with respect to its willingness to press its constitutional prerogatives in court as it is with its willingness to do the same through the negotiation-accommodation process.

V. WHEN SHOULD A COURT INTERVENE IN A CONGRESSIONAL EXECUTIVE PRIVILEGE DISPUTE?

The question remains, however, whether there are any circumstances under which a court should step in to resolve an executive privilege dispute with Congress. The answer seems clear based upon our constitutional history: A court should intervene only when the parties are not playing within the constitutionally specified boundaries that define the nature of information disputes between Congress and the president. The President has no absolute right to withhold documents from Congress, and Congress has no absolute right to determine unilaterally what information the President must divulge.

⁴³⁹ Stephen C. N. Lilley, *Suboptimal Executive Privilege*, 2009 BYU L. REV. 1127, 1131 (2009).

⁴⁴⁰ *Executive Privilege—Secrecy in Government: Hearings Before the Subcomm. on Inter-Governmental Relations of the S. Comm. on Gov't Operations*, 94th Cong. 87 (1975) (statement of Antonin Scalia, Assistant Att'y Gen., Office of Legal Counsel).

Thus, if, through some clever plot, a congressional Sergeant-at-Arms were ever able to arrest and imprison an executive branch official for asserting the president's claim of executive privilege, a court should declare, in the context of a habeas corpus proceeding, that Congress has no right to arrest the official under those circumstances and must instead negotiate in good faith to reach an accommodation with the executive branch. Similarly, if the President asserts an absolute privilege and, by failing to disclose even the nature of the documents that are being withheld, as President Bush did in connection with the U.S. Attorney firings, then a court should rule that the President has no absolute right to assert executive privilege and must disclose the nature of the documents withheld in order to begin negotiating fairly with Congress.

In fact, that is precisely what the court did in the *Miers* case. Judge Bates correctly ruled that Miers was not absolutely immune from testimony before the congressional committee and Bolten was not absolutely privileged from having to produce any information about the documents that were being withheld from Congress.⁴⁴¹ Then, Judge Bates wisely refrained from intervening any further in the dispute, and he directed the parties to resume negotiating.⁴⁴² The Court carefully described how limited its role in the dispute would be:

Indeed, the ultimate disposition that the Court reaches today—that Ms. Miers is not absolutely immune from congressional process and that Mr. Bolten must produce more detailed documentation concerning privilege claims—still does not address the merits of any particular assertion of presidential privilege. Hence, this Court's intervention is strikingly minimal, and it is the Court's sincere desire that it stays that way. The Court strongly encourages the parties to reach a negotiated solution to this dispute. Quite frankly, this decision does not foreclose the accommodations process; if anything, it should provide the impetus to revisit negotiations.⁴⁴³

Thus, in the end, the *Miers* case does not show that the system for resolving executive privilege disputes is broken. Rather, it shows that, when the usual process for resolving executive privilege disputes with Congress goes awry because one side claims a unilateral and conclusive right to prevail, the courts will step in in the most limited manner to reject claims of constitutional absolutism and redirect the partners along the path of the negotiation-accommodation process.

441 See *Comm. on Judiciary v. Miers*, 558 F. Supp. 2d 53, 106–07 (D.D.C. 2008) (holding that former White House counsel was not entitled to absolute or qualified immunity).

442 *Id.* at 107.

443 *Id.* at 98–99.

CONCLUSION

Congress and the President have important constitutional prerogatives that occasionally conflict with one another. Congress has the power to subpoena documents and testimony, and the President has the right to maintain the confidentiality of certain information within the executive branch. Each of these prerogatives has a long established history, and each has been recognized by the Supreme Court. Neither prerogative is absolute, and each must yield under certain circumstances.

The Bush Administration clearly overreached when it claimed that White House information concerning the U.S. Attorneys scandal was absolutely privileged. It would be equally problematic, however, for Congress to claim that it alone has the absolute right to determine the validity of an executive privilege claim. The proper balance of power between the branches would be especially threatened if Congress attempted to utilize its inherent contempt power to imprison an official who asserted the President's claim of executive privilege. Not only is there no historical precedent for congressional use of such a coercive sanction against an official who is asserting the President's constitutionally-based privilege, but there is also a long history of disputes between Congress and the President where Congress has effectively acknowledged that it does not possess that power. Moreover, such a power is clearly unnecessary for Congress to enforce its legitimate investigative demands. Indeed, the history of executive privilege since the Nixon era shows that, if anything, Congress may possess too much leverage, at least if Congress is controlled by a party other than the President's. There simply is no need, and no constitutional right, for Congress to decide unilaterally when it should prevail in a privilege dispute.

Instead, Congress and the President have traditionally resolved information disputes through the negotiation-accommodation process, rather than through the assertion of claimed absolute rights. This process works creatively to fashion compromise agreements that involve far more creative and useful terms and conditions than a court could ever come up with on a principled basis if it were to attempt to adjudicate a congressional-executive information dispute. Courts should step in only when the negotiation-accommodation process breaks down because one side has asserted an absolute right to prevail without compromise, and even then only to the extent of rejecting claims of absolute constitutional prerogative. Once the parties understand that they have no unilateral right to determine the resolution of such disputes, the negotiation-accommodation process can

effectively operate to settle disputes without further resort to the judicial process.